Supreme Court, U.S.
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No. 06-595

In The
Supreme Court of the United States

TYLER CHASE HARPER, ET AL.,

Petitioners,

vs.

POWAY UNIFIED SCHOOL DISTRICT, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A school district in the State of California broadly prohibits students from expressing any "negative" views. Pursuant to this policy, school officials permit students to express what school officials deem "positive" views of homosexual behavior, but prohibit students from expressing what school officials deem to be "negative" views on this topic. A divided Ninth Circuit upheld the denial of preliminary injunctive relief against this viewpoint discrimination.

1. Did the Ninth Circuit err in holding, in conflict with opinions of the Third Circuit and this Court, that a high school student's "negative" speech may be censored because it allegedly "interferes with the rights of other students" who perceive it as "demeaning" or "derogatory?"

2. Did the Ninth Circuit err in holding, in conflict with the decisions of the Third, Second, and Sixth Circuits, and this Court, that high school officials are permitted to censor student viewpoints on one side of a debate?

3. Should this Court vacate the decision below under *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950), where petitioner Tyler Chase Harper's graduation has rendered moot his request for a preliminary injunction?

PARTIES

Petitioner Tyler Chase Harper ("Chase") brought suit by and through his parents Ron and Cheryl Harper and was a Plaintiff-Appellant before the Ninth Circuit. Chase's sister Kelsie Harper was added as a party to the ongoing proceedings at the district court level after Chase appealed the District Court's denial of his motion for preliminary injunction to the Ninth Circuit. *Harper v. Poway Unified School Dist.*, 445 F.3d 1166, 1173 n.9 (9th Cir. 2006). Appendix 8a ("App."). Kelsie is filing a motion in this Court, simultaneously with the present petition, to intervene as a petitioner for purposes of this petition for certiorari, and conditionally joins Chase herein.

Besides the Respondent Poway Unified School District ("School"), the following are respondents and were Defendants-Appellees before the Ninth Circuit: Jeff Mangum, Linda Vanderveen, Penny Ranftle, Steve McMillan, and Andy Patapow, individually and in their official capacities as Members of the School Board; Dr. Donald A. Phillips, individually and in his official capacity as Superintendent of the School; Scott Fisher, individually and in his official capacity as Principal of Poway High School; Lynell Antrim, individually and in her official capacity as Assistant Principal of Poway High School; Ed Giles, individually and in his official capacity as Vice Principal of Poway High School; and David LeMaster, individually and in his official capacity as a teacher at Poway High School.

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DECISIONS BELOW

The decision of the district court denying a preliminary injunction is reported as *Harper v. Poway Unified School Dist.*, 345 F. Supp. 2d 1096 (S.D. Cal. 2004). App. 82a. The 2-1 decision of the court of appeals affirming the district court's order is reported as *Harper v. Poway Unified School Dist.*, 445 F.3d 1166 (9th Cir. 2006). App. 1a. The decision of the court of appeals denying rehearing *en banc* over five dissenting votes is reported at *Harper v. Poway Unified School Dist.*, 455 F.3d 1052 (9th Cir. 2006). App. 135a. The decision of the Ninth Circuit denying Petitioners' motion for vacatur is not reported. App. 133a.

JURISDICTION

The Ninth Circuit rendered its 2-1 panel decision on April 20, 2006, and amended the opinion on May 31, 2006. Petitioner filed a petition for rehearing *en banc* on April 28, 2006 and a request for vacatur due to mootness on July 26, 2006. The United States Court of Appeals denied the petition for rehearing *en banc* (which was dissented from by five judges), and the request for vacatur on July 31, 2006. This Court has jurisdiction under 28 U.S.C. § 1254(1) if the Motion to Intervene of Kelsie J. Harper, currently pending before this Court, is granted. If the motion to intervene is denied, this Court has jurisdiction only to vacate the Ninth Circuit's opinion and the District Court's opinion, because Chase has graduated and his request for a preliminary injunction is moot.

CONSTITUTIONAL PROVISIONS AND POLICIES

The First Amendment to the United States Constitution provides as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of

> speech, or the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. I.

The first section of the Fourteenth Amendment to the United States Constitution provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United Sates and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

The regulations of the Poway Unified School District governing student expression in public schools are set forth in the Appendix at 187a-201a.

STATEMENT OF THE CASE

A. Facts Material to Consideration of the Questions

1. The School's policies banning offensive speech

The School has published a student policy handbook that includes a section entitled "Socially Responsible Behavior." According to section C.3.e of this section, clothing that "promote[s] or portray[s] . . . violence or hate behavior including derogatory connotations directed toward sexual identity" violates the school dress code. App. 323a. Poway Unified School District Administrative Regulation 5.28.1 gives the following examples of hate behavior: "2. The presence of symbols or words considered offensive to persons of a specific gender, race, ethnicity, religion, sexual orientation, or the mentally or physically challenged. . . ." App. 189a.

Additionally, the School has prepared "Poway High School Student Handbook." App. 318a-338a. In this guide, harassment is defined as "unwanted and unwelcome behavior from other students or staff members that interferes with another individual's life." App. 333a. Defendants' policies explain that all "[n]egative comments or behavior based on race, ethnicity, sexual orientation, religion, or gender" are prohibited for students and staff. App. 191a, 192a.

2. The Harpers' religious views

Chase Harper was sixteen years old and a sophomore at Poway High School in the Poway Unified School District at the time of the acts alleged in the initial complaint. App. 144a, 146a, 148a. He has since graduated. App. 313a, 314a. Kelsie Harper is currently a junior at Poway High. App. 148a. Both believe the Bible is the inspired Word of God, and that homosexual behavior is contrary to the teachings of the Bible. App. 148a. Because they believe that homosexual behavior is damaging to both the participants and to society at large, the Harpers believe they have a moral and religious obligation to warn classmates and others of that danger. App. 148a, 149a.

3. The School's approval of student speech endorsing homosexual behavior

The School authorizes students and staff at Poway High School to annually observe a "Day of Silence." App. 179a, 180a. The "Day of Silence" is a national event sponsored by GLSEN—a professional advocacy organization for those engaged in homosexual behavior. App. 231a. In 2004 this event occurred on April 21. The purpose of the Day of Silence is to endorse, promote, and encourage legal protection and tolerance of homosexual behavior—behavior that the Harpers believe is harmful to those who engage in it. App. 148a, 149a. Participating students refuse to speak during the school day. App.

149a. Students and staff members support legal protection and tolerance of homosexual behavior by wearing expressive T-shirts, placing duct tape over their mouths with written messages on the tape, posting flyers and posters around campus, wearing buttons on clothing, and engaging in other expression. App. 175a, 179a-181a. The School-approved speech of students observing the Day of Silence includes: displaying posters with the words "Stop the Hate," "fags," "queers," "that's so gay," and "loser;" and wearing T-shirts with a purple square and yellow "equal" sign on them. App. 180a. The School has also permitted male students to wear T-shirts stating "I Kiss Boys." *Id.* The Gay-Straight Alliance student club sponsored the Day of Silence in 2004. App. 144a.

Apart from the Day of Silence, the School permits student speech and debate regarding the subject matter of acceptance of homosexual behavior, "tolerance," and related issues. App. 179a-181a. But the School censors student speech that does not support homosexual behavior. App. 180a-181a.

4. The Harpers' speech

On April 21, 2004, Chase wore an expressive homemade T-shirt in response to other students' speech supporting the "Day of Silence." App. 149a-150a. On the front of the shirt, he placed words that read: "I will not accept what God has condemned." The back of the shirt read "Homosexuality is shameful. Romans 1:27." App. 149a. On the following day, April 22, 2004, he wore a similar shirt. The message on the back remained the same, but he altered the front so that it read: "Be ashamed. Our school has embraced what God has condemned." App. 150a. Kelsie Harper would like to engage in this same speech at school, but has been prohibited by school policy from doing so. App. 148a, 149a, 150a-153a.

5. The School's censorship of speech

During his second class period on April 22, 2004, Chase was told by his teacher, David LeMaster, that he was in violation of the school dress code and must either remove the T-shirt or report directly to the school office. App. 150a. Chase chose to report to the school office, where he met with Assistant Principal Lynell Antrim. Ms. Antrim informed Chase that his T-shirt was in violation of the dress code because it was "homemade" and because the words on the T-shirt were "inflammatory." *Id.* She instructed him to replace the T-shirt and offered him the opportunity to return to class if he would comply with her instruction. App. 150a, 151a. Chase declined to replace the T-shirt. He was instructed to wait until the principal would be available to discuss disciplinary action against him, and was eventually sent to Principal Scott Fisher's office. App. 151a.

Mr. Fisher told Chase that his T-shirt was too "aggressive" and that wearing it would not be tolerated at Poway High School. App. 151a. Although Chase had been told by Ms. Antrim that it was the homemade nature of his T-shirt that violated the dress code, App. 150a, Mr. Fisher told him that it did not matter whether the T-shirt was homemade or professionally manufactured. App. 151a. Mr. Fisher stated the penalty would be the same either way because the content was inflammatory. *Id.*

At the end of the interview, Mr. Fisher commended Chase for being courteous and respectful. App. 151a. Mr. Fisher informed him that although his punishment would be mitigated because of his courtesy and respect, Chase would still be suspended from school. *Id.* He would also have to stay in the office for the remainder of the school day, at which time he would be required to leave the school grounds by the most direct route. *Id.* Chase was not allowed to leave the office without an escort. App. 152a. Except for supervised visits to the restroom, he stayed in

the office for the rest of the day. *Id.* Throughout the afternoon, various school officials visited Chase, some of whom conversed with him about the situation. *Id.*

6. The School's attempt to coerce Chase to change his religious beliefs

While Chase was detained in the office, he was interrogated by an armed deputy sheriff. App. 152a. The deputy's firearm was openly visible to Chase during the entire interview. *Id.* The deputy showed Chase his badge and took several pictures of him, but did not arrest him. *Id.* The deputy told Chase the purpose of his visit was to ascertain whether Chase was a dangerous student, to find out why he wore the T-shirt, and to determine whether he would engage in similar behavior in the future. *Id.* He also told Chase that he should not be offensive to others, since Christianity is based on love, not hate. App. 153a.

At the end of the day, Chase was told to collect his things and report to Assistant Principal Ed Giles' office. *Id.* Upon entering Mr. Giles' office, Chase was directed to close the door, which he did. *Id.* Mr. Giles told Chase that he knew Chase's family and youth pastor. *Id.* He told Chase that he was a Christian too, but that he leaves his faith "in the car." *Id.* Mr. Giles told Chase that he must also "leave his faith in the car" because his beliefs were offensive to others. App. 153a; *but see* App. 360a. Chase respectfully told Mr. Giles that he could not leave his faith in the car. App. 153a.

After this visit, Chase was told he was free to go home, but that he was to leave campus immediately and must remain off-campus for the rest of the day. App. 153a. He was not even permitted to go to his locker to collect his homework. App. 154a. Chase complied with these instructions and went directly home. *Id.*

The School provides on its website a number of resources for parents to help them address a variety of

issues with their children, including drugs, alcohol, depression, and "gender issues." App. 197a-199a. Under gender issues, the School offers links to only two websites. The first, www.familyacceptance.com, is described as "answer[ing] questions and discuss[ing] religious aspects" of gender issues. The site poses the question: "Is Homosexuality a Sin?" In response, the site clearly states that the Bible does not say homosexual behavior is a sin, and accuses those who say otherwise of "hypocrisy." App. 202a-203a. A second site, www.bidstrup.com/parents.htm, claims to address "what the bible experts have to say" about homosexual behavior being a sin. It goes on to explain that homosexual behavior is not a sin, and provides a bibliography of books that support this position. App. 204a. The School does not provide a link to any site that provides the view that homosexual behavior is sinful.

7. Negative viewpoints banned

Chase's parents were not notified of the situation until shortly before the end of the school day on April 22, 2004. App. 154a. At that time, Assistant Principal Giles telephoned Ron Harper and informed him that his son had been detained and suspended for the day for wearing an expressive T-shirt. *Id.* Ron Harper was initially told that "homemade T-shirts were not allowed." *Id.* When Ron Harper stated that he had seen other homemade T-shirts at the school in the past, he was then told that "only positive community messages were allowed." App. 154a. Shirts with "negative" messages were not allowed. *Id.*; see also App. 348a (Ms. Antrim discussed with Chase Harper ways that he "could bring a positive light onto this issue without condemnation"); App. 358a (Mr. Giles told Ron Harper "we did not want messages that carried with them a negative tone."). Ron Harper was also told that the principal had the discretion to determine whether a message was positive or negative. App. 154a. Other students expressing a "positive" viewpoint by wearing

"straight pride" T-shirts have also been censored by the School. App. 179a, 184a.

8. Chase's speech caused no disruption

The following day, Ron Harper went to school to discuss his son's suspension. At that time, he was told that Chase had conducted himself honorably and had shown respect to school administrators at all times. App. 154a. He was also informed there had been no disruptions, altercations, or other incidents among students at the school giving rise to Chase's suspension. *Id.* At no point during or after Chase's suspension did any school or government official make reference to any complaint by another student regarding Chase's T-shirt or to any disruption caused by his T-shirt. App. 150a-154a. Mr. Giles only speculated that Chase's T-shirt might "incite a reaction from opposing positions." App. 174a-176a. In fact, when Ms. Antrim reported the situation to Principal Fisher, her only concern was that the T-shirt was "inflammatory in nature" with no mention of any disruption. App. 340a. Chase never witnessed any hostile or unsettling confrontations or any disruptions to the operations of the school on either day that he wore his expressive T-shirts. App. 174a-176a. This fact was also confirmed by another student, Joel Rhine. App. 181a.

B. Course of Proceedings

Chase filed a Verified Complaint and Demand for Jury Trial on June 2, 2004 alleging six causes of action. The first five arise under the United States Constitution: free speech, free exercise, equal protection, due process, and the Establishment Clause. The sixth cause of action arises under California Civil Code § 52.1. The Complaint seeks a preliminary and permanent injunction prohibiting Defendants from further violating students' constitutional rights and a declaratory judgment declaring various school

board policies unconstitutional. Chase also seeks damages and attorneys' fees.

Defendants filed a Motion to Dismiss on June 22, 2004. Chase filed a Motion for Preliminary Injunction on July 12. Both motions were heard together on August 26 before the Honorable John A. Houston of the Southern District of California. The district court on November 4, 2004, denied Chase's Motion for Preliminary Injunction and denied Defendants' Motion to Dismiss Plaintiff's freedom of speech, free exercise, and Establishment Clause causes of action. App. 82a-131a. The court granted the Motion to Dismiss without prejudice as to the equal protection cause of action and with prejudice as to the due process cause of action, but denied the motion as to the remaining causes of action. *Id.* Chase filed a Notice of Appeal from the denial of the preliminary injunction on November 19, 2004.

On November 17, 2004, prior to Defendants filing an answer, Chase filed a First Amended Verified Complaint attempting to add his sister, Kelsie J. Harper, as an additional Plaintiff. Ms. Harper is currently a junior at Poway High School who desires to engage in the same, or substantially the same, expression as Chase. The First Amended Verified Complaint re-alleged each cause of action in total, out of an abundance of caution, so as not to waive any issues on appeal. It also amended the equal protection cause of action. Defendants filed a Motion to Dismiss as to the First Amended Verified Complaint on December 10, 2004. On February 22, 2005, the district court granted the Defendants' Motion to Dismiss all of Kelsie's claims in the First Amended Verified Complaint, as well as Chase's due process and damages claims. All other claims, including Chase's equal protection claim, were permitted to proceed. Plaintiffs Tyler Chase Harper and Kelsie Harper moved the district court for permission to file a Second Amended Verified Complaint through their parents on August 10, 2005, alleging all previous claims as

well as two additional state law claims. App. 143a-172a. The district court granted the motion on November 4, 2005. The Second Amended Verified Complaint is currently before the District Court; cross-motions for summary judgment are pending.

After filing his notice of appeal, Chase filed a Motion for Injunction Pending Appeal on December 20, 2004 pursuant to FRCP § 62(c). That motion was summarily denied on March 30, 2005. Judge Reinhardt authored the Ninth Circuit's split opinion affirming the denial of preliminary injunction on April 20, 2006, and amended the opinion on May 31, 2006. Judge Thomas joined Judge Reinhardt's opinion. Judge Kozinski strongly dissented.

Petitioner filed a petition for rehearing *en banc* on April 28, 2006 and a request for vacatur due to mootness on July 26, 2006. The United States Court of Appeals denied the petition for rehearing *en banc* on July 31, 2006. Judge O'Scannlain dissented from the denial of rehearing and his opinion was joined by four other judges: Kleinfeld, Tallman, Bybee, and Bea. Petitioner's request for vacatur was denied on July 31, 2006.

REASONS FOR GRANTING THE WRIT

The Ninth Circuit held, over a vigorous dissent, that school officials are permitted to censor the "negative" side of a political debate if the views expressed may be considered "demeaning" or "derogatory." The court held that this viewpoint censorship is justified because the speech infringes upon the rights of other students, citing *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503 (1969). This novel First Amendment theory means that students may express their view that homosexual behavior should be approved, even encouraged, but students holding the contrary view can—and arguably must be—censored. Under the Ninth Circuit's rule, school officials would have been justified in censoring Mary Beth Tinker's

armband if other students could have felt demeaned by her negative view of the Vietnam War. The ruling conflicts with the decision of other circuits and this court in two distinct ways.

First, the Ninth Circuit's application of *Tinker* directly conflicts with the Third Circuit's determination that the "infringe upon the rights of other students" language does not authorize the wholesale prohibition of speech perceived as negative, demeaning, or derogatory. *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200 (3d Cir. 2001). The Ninth Circuit's holding is also at odds with decisions of this Court discussing infringing upon the rights of others in the school context. *See, e.g., West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

The second conflict arises from the Ninth Circuit's authorization of viewpoint discrimination. Under its decision, "school administrators are now free to give one side of debatable public questions a free pass while muzzling voices raised in opposition." App. 140a. (O'Scannlain, joined by Kleinfeld, Tallman, Bybee, and Bea, dissenting from denial of rehearing *en banc*). This sanctioning of viewpoint censorship in public schools conflicts with relevant decisions of the Sixth, Second, and Third Circuits. *See Castorina ex rel. Rewt v. Madison County Sch. Bd.*, 246 F.3d 536 (6th Cir. 2001); *Guiles v. Marineau*, 461 F.3d 320 (2d Cir. 2006); *Saxe*. It also directly conflicts with this Court's cases prohibiting viewpoint discrimination. *See, e.g., Tinker*; *R.A.V. v. St. Paul*, 505 U.S. 377 (1992); *Lamb's Chapel v. Center Moriches School Dist.*, 508 U.S. 384 (1993); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995).

The desire of school officials to protect the sensibilities of students does not justify excluding perceived "negative" and "offensive" views from First Amendment protection. Such censorship effectively undercuts the very purpose of the First Amendment—to protect and promote debate. The Ninth Circuit has authorized schools to "prescribe what

shall be orthodox in politics, nationalism, religion, or other matters of opinion," *Barnette*, 319 U.S. at 642, by mandating censorship of only the "negative" side of the political debate on homosexual behavior (and in theory, any other controversial issue). This Court's review is necessary.

If Kelsie's motion to intervene is denied, this Court should grant certiorari for purposes of vacating the Ninth Circuit's and District Court's opinions. Chase's graduation this past June involuntarily renders his request for a preliminary injunction moot. The lower court decisions denying the motion for preliminary injunction must therefore be vacated under *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950) because the Petitioner was not given the opportunity to take advantage of the entire appellate process.

I. THE NINTH CIRCUIT'S HOLDING CONFLICTS WITH THE THIRD CIRCUIT'S DETERMINATION THAT NEGATIVE, DEMEANING, AND DEROGATORY SPEECH DOES NOT INFRINGE UPON THE RIGHTS OF OTHER STUDENTS, AS WELL AS THIS COURT'S CASES PROTECTING OFFENSIVE SPEECH.

Tinker held that a high school student's expression of opposition to the Vietnam War by wearing a black armband could not be censored by officials because it did not "materially disrupt[] classwork or involve[] substantial disorder or invasion of the rights of others. . . ." 393 U.S. at 513. The Ninth Circuit latched onto the "invasion of the rights of others" language as authority for school officials to censor any student speech that may be perceived by other students as demeaning or derogatory. App. 24a-25a.

This holding directly conflicts with the Third Circuit's determination in *Saxe* that a high school speech policy

which prohibited negative, demeaning, and derogatory speech was unconstitutional. It also conflicts with a fair reading of *Tinker* and this Court's line of cases holding that offensive speech is exactly what the First Amendment is designed to protect. *See, e.g., Texas v. Johnson*, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea offensive or disagreeable."); *United States v. Eichman*, 496 U.S. 310, 319 (1990) (same).

A. Conflict with the Third Circuit

Saxe struck down a public school district's anti-harassment policy that banned harassment such as "derogatory remarks, jokes, demeaning comments or behaviors," and "negative name calling and degrading behavior. . . ." 240 F.3d at 202-03. Like the Harpers, the plaintiffs sued because "[t]hey believe, and their religion teaches, that homosexuality is a sin [and] . . . they have a right to speak out about the sinful nature and harmful effects of homosexuality." *Id.* at 203.

In analyzing the "rights of others" prong of *Tinker*, the Third Circuit observed:

> The precise scope of *Tinker's* "interference with the rights of others" language is unclear; at least one court has opined that it covers only independently tortious speech like libel, slander or intentional infliction of emotional distress. *See Slotterback v. Interboro Sch. Dist.*, 766 F. Supp. 280, 289 n. 8 (E.D.Pa. 1991); *see also Kuhlmeier v. Hazelwood Sch. Dist.*, 795 F.2d 1368, 1375 (8th Cir. 1986), *rev'd on other grounds*, 484 U.S. 260, 108 S.Ct. 562, 98 L.Ed.2d 592 (1988).

Id. at 217. In determining what speech might infringe upon the rights of others, the court held that "it is certainly not enough that the speech is merely offensive to some listener." *Id.*

In an effort to avoid the obvious conflict with *Saxe*, the Ninth Circuit claimed that it did not authorize the censorship of merely offensive speech, and limited its holding to "derogatory" and "demeaning" speech. App. 20a, n.21, App. 25a-27a. But even assuming that there is a meaningful, non-vague distinction between these terms (a very dubious proposition), the unconstitutional policy in *Saxe* also censored "derogatory" and "demeaning" speech, in addition to offensive speech. 240 F.3d at 202-03.

> Because the Policy's "hostile environment" prong does not, on its face, require any threshold showing of severity or pervasiveness, it could conceivably be applied to cover any speech about some enumerated personal characteristics the content of which ***offends someone. This could include*** much "core" political and religious speech: the Policy's "Definitions" section lists as examples of covered harassment ***"negative"*** or ***"derogatory" speech*** about such contentious issues as "racial customs," "religious tradition," "language," "sexual orientation," and "values." Such speech, ***when it does not pose a realistic threat of substantial disruption,*** is within a student's First Amendment rights.

Id. at 217 (emphasis added). *See also id.* at 202-03 (unconstitutional policy in *Saxe* prohibited "derogatory" and "demeaning" speech).[1]

The Ninth Circuit conceded that its opinion conflicts with *Saxe's* observation that "offensive" speech does not violate the "rights of others" prong of *Tinker* "when it does not pose a realistic threat of substantial disruption." App. 20a, n.21 (referring to *Saxe*, 240 F.3d at 217). The Ninth

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[1] Other federal courts have stricken prohibitions on "demeaning" speech. *See Dambrot v. Cent. Michigan Univ.*, 839 F. Supp. 477 (E.D. Mich. 1993); *UWM Post, Inc. v. Bd. of Regents of the Univ. of Wisconsin Sys.*, 774 F. Supp. 1163 (E.D. Wis. 1991).

Circuit disagreed because "[t]he two prongs of *Tinker* are stated in the alternative." *Id.* But *Tinker* itself supports the Third Circuit's reading in the following passage:

> [T]he record fails to yield evidence that the school authorities had reason to anticipate that the wearing of the armbands would substantially interfere with the work of the school or impinge upon the rights of other students. Even an official memorandum prepared after the suspension that listed the reasons for the ban on wearing the armbands made no reference to the anticipation ***of such disruption.***

393 U.S. at 509 (emphasis added).

The Third Circuit's reading of *Tinker* makes the most sense because it avoids the prospect of students who are offended or feel demeaned censoring the speech of other students—a "Heckler's Veto." In any event, this circuit split over the proper reading of *Tinker* warrants this Court's review.[2]

B. The Ruling Conflicts with this Court's Precedent Regarding "Rights of Others."

The Ninth Circuit's broad reading of "rights of others" conflicts with this Court's cases holding there is no right to be protected from offensive speech. The court's attempt to

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[2] The confusion the Ninth Circuit's opinion has created is confirmed by numerous legal commentators. *See, e.g.*, Eugene Volokh, *Sorry, Your Viewpoint is Excluded from First Amendment Protection*, April 20, 2006, http://volokh.com/posts/1145577196.shtml; *When Students Speak*, WASH. POST, Aug. 7, 2006 at A14 (pointing out the need for this Court to review this case); Michael Oberst, *9th Circuit Was Wrong to Let School Censor Student's T-Shirt*, LOS ANGELES DAILY JOURNAL, Aug. 23, 2006, at 8; Dale Carpenter, *Right Result Under a Bad Precedent*, April 21, 2006, http://volokh.com/archives_2006_04_16-2006_04_22.shtml; David L. Hudson Jr., *Tinkering with Tinker Standards?*, Aug. 9, 2006, http://www.fac.org/analysis.aspx?id=17253.

limit its authorization of censorship to demeaning and derogatory speech about minorities or core characteristics only complicates matters.

1. There is no right not to be offended.

This Court has ***never*** carved out from First Amendment protection speech that offends others. Such offence, contrary to the Ninth Circuit, is not a cognizable invasion of third party rights that could justify censorship of viewpoints. In *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943), this Court held that a student's right not to salute the flag and recite the pledge of allegiance is protected by the Free Speech and Free Exercise Clauses of the First Amendment, observing:

> The freedom asserted by these appellees ***does not bring them into collision with rights asserted by another individual***.... [T]he refusal of these persons to participate in the ceremony ***does not*** interfere with or ***deny rights of others*** to do so.

319 U.S. at 630 (emphasis added). "Rights of others" refers to other students' First Amendment rights to salute the flag and recite the pledge. It certainly does not refer to the rights of other students not to be offended by any perceived lack of patriotism on the part of the non-participating students.

Reading *Tinker* in light of *Barnette* can only lead to the conclusion that "infringing on the rights of others" does not mean simply offending them with negative, derogatory, or demeaning speech. Otherwise, schools could—as happened here—censor one side of a political or religious debate merely because another student may take offense.

Tinker's citation to *Blackwell v. Issaquena County Bd. of Educ.*, 363 F.2d 749 (5th Cir. 1966), as an example of when other's rights are infringed shows that something

more than offensive or derogatory speech is needed to infringe on the rights of others. 393 U.S. at 513. In *Blackwell*, the Fifth Circuit rejected the free speech claims of students distributing buttons protesting racism at school. The students actually "accosted other students by pinning the buttons on [other students] even though they did not ask for one." 363 F.2d at 751. Obviously, students have a right not to be physically accosted and forced to speak in a way that violates their beliefs. *See Barnette*.

But they do not have a "right" to be protected from speech that may offend them because it is negative, derogatory, or demeaning.

> Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our constitution says we must take this risk, *Terminiello v. Chicago*, 337 U.S. 1 (1949); and our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.

Tinker, 393 U.S. at 508-09.

No doubt many students with relatives fighting in Vietnam felt demeaned and offended by Mary Beth Tinker's speech condemning the war. But this is exactly the type of speech that needs protecting—especially in the high school context.

> The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools. The classroom is peculiarly the marketplace of ideas. The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues, rather than through any kind of authoritative selection.

Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967) (internal citations, quotations and editing marks omitted).

Without this protection, those feeling offended or demeaned by another's speech can have it censored—the classic Heckler's Veto. This Court has routinely rejected this type of censorship. "Speech cannot be . . . punished or banned, simply because it ***might offend*** a hostile mob." *Forsyth County, Ga. v. The Nationalist Movement*, 505 U.S. 123, 135-36 (1992) (emphasis added) (addressing restriction based on adverse listener reaction to, *inter alia*, a demonstration in opposition to Martin Luther King Day). *See also R.A.V.*, 505 U.S. at 389 ("a State may not prohibit only that commercial advertising that depicts men in a ***demeaning*** fashion." (emphasis added)).

The Ninth Circuit majority's "unprecedented-and unsupportable-expansion of the right to be let alone as including a right not to be offended has no basis in *Tinker* or its progeny. . . ." App. 139a (O'Scannlain, dissenting from denial of rehearing *en banc*).

2. The Ninth Circuit's limitations on its new rule do not save it.

The Ninth Circuit claimed its holding permits speech that is offensive, and is merely authorizing censorship of "derogatory and injurious remarks directed at students' minority status," or "core characteristics." App. 25a-27a.[3] But how should "core characteristics" or "minority" be defined? The Ninth Circuit offered no definition—despite being castigated by the dissent for failing to do so—but merely mentioned "race, religion, and sexual orientation" as non-exclusive examples of "minority" features. App. 27a. This only complicates matters.

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[3] The court also asserted that its holding does not apply to political speech, App. 26a, but in another part of the opinion concedes that Chase's speech is core political speech. *Id.* at App. 14a.

> In defining what is a minority—and hence protected—do we look to the national community, the state, the locality or the school? In a school that has 60 percent black students and 40 percent white students, will the school be able to ban t-shirts with anti-black racist messages but not those with anti-white racist messages, or vice versa?

App. 63a (Kozinski, dissenting). Worse, the status of the "minority" limitation is in question because the Ninth Circuit conceded in a footnote that censorship of derogatory and demeaning speech about core characteristics of "majority" students may also be permitted. App. 27a, n.28.

Further complications arise from the court's use of the phrase "core identifying characteristics," sometimes interchangeably with "minority status." For instance, the test is first stated as: "Public school students who may be injured by verbal assaults on the basis of a core identifying characteristic such as race, religion, or sexual orientation, have a right to be free from such attacks while on school campuses." App. 17a. No attempt is made to define "core identifying characteristics." "Race, religion, or sexual orientation" are only listed as examples.

> Read broadly, this would protect students from being disparaged based on any characteristic that two of my colleagues consider to be "core." Presumably this could include race, nationality, sex, weight class, hair color and religion—but not political affiliation.

App. 62a-63a n.11 (Kozinski, dissenting) (citing the confusing way the majority articulates its new test). Even if the Ninth Circuit could adequately define these terms, they have not explained why students who happen to find

themselves in the majority have diminished free speech protection.[4]

Furthermore, there is no meaningful difference between "derogatory" and "offensive" for First Amendment purposes. Derogatory remarks can be offensive and offensive remarks can be derogatory. The Third Circuit essentially treated them as synonyms in *Saxe*. 240 F.3d at 217 (saying that "offensive" speech includes "'derogatory' speech about such contentious issues as 'racial customs,' 'religious tradition,' 'language,' 'sexual orientation,' and 'values.'") Derogatory speech is offensive speech and is protected by the First Amendment—even in public high schools.

The Ninth Circuit has given school officials unbridled discretion to restrict thought-provoking speech that is arbitrarily deemed derogatory or demeaning, which is speech the First Amendment was designed to protect. Its misapplication of *Tinker* not only conflicts with the decisions of the Third Circuit, but with those of this Court—warranting certiorari.

II. THE NINTH CIRCUIT'S AUTHORIZATION OF VIEWPOINT CENSORSHIP BY SCHOOLS CONFLICTS WITH DECISIONS OF OTHER CIRCUITS AND THIS COURT.

The Ninth Circuit majority held that public schools can censor a student's viewpoint merely because administrators or other students may think it is demeaning or derogatory. This decision conflicts with rulings in the Sixth, Second,

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[4] Minorities have no more right to suppress the views of the majority than the majority has a right to suppress minority views. *See Coates v. Cincinnati*, 402 U.S. 611, 616 (1971) (speech of individuals cannot be punished "because their ideas, their lifestyle, or their physical appearance is resented by the majority of their fellow citizens").

and Third Circuits regarding content and viewpoint discrimination in public schools. *See Castorina ex rel. Rewt v. Madison County Sch. Bd.*, 246 F.3d 536 (6th Cir. 2001); *Guiles v. Marineau*, 461 F.3d 320 (2d Cir. 2006); *Saxe v. State College Area Sch. Dist.*, 240 F.3d 200 (3d Cir. 2001).

The decision below also conflicts with this Court's holding that student speech cannot be censored merely "to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." *Tinker*, 393 U.S. at 509.

A. There is a Conflict in the Circuits Regarding the Permissibility of Discrimination Against Student Viewpoints in Public Schools.

The Ninth Circuit held that "a school may prohibit student speech, even if the consequence is viewpoint discrimination, if the speech violates the rights of other students or is materially disruptive." App. 30a. The Court therefore authorized the School to censor Chase Harper's non-disruptive criticism of homosexual behavior and the "Day of Silence," but permitted the speech of other students who spoke in ***favor*** of these. The Ninth Circuit upheld this viewpoint discrimination despite the fact that the observance of the "Day of Silence" involves the disruptive behavior of students refusing to speak in class—even if called upon by a teacher—and caused enough disruption in past years to warrant intervention by school officials, including a meeting with the student club sponsoring the event. App. 343a, 347a. There is absolutely no evidence in the record that the disruption on past "Days of Silence" was caused by those—like Chase—opposed to the Day of Silence.

The Fifth Circuit has also opined that viewpoint censorship may be permissible if it causes material disruption or would infringe upon the rights of other

students. *See Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608, 615 (5th Cir. 2004). But it has never actually applied that rule to any set of facts. Taking the Fifth Circuit's rule at face value, there is a clear split between the Ninth and Fifth Circuits on one side, and the Sixth, Second, and Third Circuits on the other, over whether viewpoint discrimination is permissible in public schools.

1. Conflict with the Sixth Circuit

In *Castorina*, the Sixth Circuit considered whether confederate flag T-shirts worn by two high school students could be censored if the school allowed students to wear Malcolm X T-shirts. 246 F.3d at 539-41. The court held that "even if there has been racial violence that necessitates a ban on racially divisive symbols, the school does not have the authority to enforce a viewpoint-specific ban on racially sensitive symbols. . . ." 246 F.3d at 544.

The court noted that school officials in *Tinker* also engaged in viewpoint discrimination, and subsequent decisions by this Court have emphasized this type of content-based censorship is presumed unconstitutional.

> Central to the decision was the fact that the school district did not ban other clothing that expressed controversial views, including Iron Crosses, which were often understood as symbols of Hitler and the Nazis. *Tinker*, 393 U.S. at 506-511. . . . This aspect of the decision is consistent with a number of later Supreme Court decisions signaling that viewpoint-specific speech restrictions are an egregious violation of the First Amendment. *See, e.g., Rosenberger* [] ("Discrimination against speech because of its message is presumed to be unconstitutional"), *R.A.V. v. St. Paul*, [] (striking down a Minnesota hate-speech statute on the basis of impermissible viewpoint discrimination).

Id. at 540. Given that Chase Harper's "negative" speech was the only side of the debate on homosexual behavior that was censored, in the Sixth Circuit this would be considered an impermissible "targeted ban." *Id.* at 541. Here the viewpoint discrimination was even more egregious since there was no evidence that Chase's speech was remotely disruptive, App. 154a, 175a, while the refusal to speak by those observing the Day of Silence—which the School allowed—obviously interfered with the ability of teachers to conduct class and caused actual disruption in the past. App. 343a, 347a.

2. Conflict with the Second Circuit

The Second Circuit recently struck down a school's ban on a 13-year-old middle school student's T-shirt depicting President Bush as a drug-abusing drunk in *Guiles v. Marineau*. The shirt contained images of alcohol and drug use in contravention of a school policy banning such depictions. 461 F.3d at 321. In response to complaints, school officials required the student to place duct tape over the offending images. *Id.* The court found that the shirt caused no disruption, though it did "raise the ire of one fellow student whose politics evidently were opposed to Guiles's." *Id.*

Finding that the school's censorship violated the student's free speech rights, the court reviewed this Court's cases on student speech and concluded (without mentioning the *Harper* decision): "*Tinker* established a protective standard for student speech under which it ***cannot be suppressed based on its content***, but only because it is substantially disruptive." *Id.* at 326 (emphasis added).

This is strikingly different from the Ninth Circuit's ruling in the case at hand, that *Tinker* permits censorship of "negative" student speech that is "demeaning" or "derogatory"—even if there is no material disruption. The

Second Circuit effectively disagreed with this holding by observing that allowing the ban of speech because it might be offensive or cause resentment cannot be reconciled with *Tinker*. Otherwise, "the rule of *Tinker* would have no real effect because it could have been said that the school administrators in *Tinker* found wearing anti-war armbands offensive and repugnant to their sense of patriotism and decency." *Guiles* at 328.

3. Conflict with the Third Circuit

The Third Circuit held in *Saxe v. State College Area School Dist.* that speech deemed to be harassing is still protected by the First Amendment, 240 F.3d at 204-10: "there is also no question that the free speech clause protects a wide variety of speech that listeners may consider deeply offensive, including statements that impugn another's race or national origin or that denigrate religious beliefs." *Id.* at 206. The court determined that a "disparaging comment" is censored by anti-harassment policies "precisely because of its sensitive subject matter and because of the odious viewpoint it expresses. This sort of content- or viewpoint-based restriction is ordinarily subject to the most exacting First Amendment scrutiny." *Id.* at 206-07.

The Third Circuit later held in *Sypniewski v. Warren Hills Reg'l Bd. of Educ.*, 307 F.3d 243, 268 n.27 (3d Cir. 2002), that "[t]he history of racial difficulties in Warren Hills provides a substantial basis for legitimately fearing disruption from the kind of speech prohibited by the policy." 307 F.3d at 262. Nevertheless, citing *R.A.V.*, the court determined that the policy could be unconstitutional if a "subcategory of disruptive speech had been singled out simply because the school officials disfavored the views expressed." *Id.* at 268 n.27.

This is precisely what the Defendants did and the Ninth Circuit approved in this case. Chase's "negative" speech was

no more disruptive than that of other students whose "positive" views on homosexual behavior had in fact caused disruption in the past. Censoring only Chase's views conflicts with the Third Circuit's rulings in *Saxe* and *Sypniewski*.

B. The Ninth Circuit's Authorization of Viewpoint Discrimination by School Officials Conflicts with the Decisions of this Court.

The Ninth Circuit's opinion conflicts with this Court's decisions regarding student speech and viewpoint discrimination. "[T]o justify prohibition of a particular opinion, . . . [the state] must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." *Tinker*, 393 U.S. at 509.

> When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant. Viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.

Rosenberger, 515 U.S. at 829 (citations omitted). *See also Lamb's Chapel v. Center Moriches School Dist.*, 508 U.S. at 394 ("The principle that has emerged from our cases 'is that the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.'" (*quoting City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984))).

The Ninth Circuit defends its approval of viewpoint and content-based censorship by limiting it to speech that may "injure students with respect to their core characteristics." App. 33a. But as *R.A.V.* shows, this is no response.

R.A.V. struck down St. Paul's ordinance that prohibited "'fighting words' that insult, or provoke violence, 'on the basis of race, color, creed, religion or gender.'" 505 U.S. at 391. The unconstitutional ordinance was strikingly similar to the Ninth Circuit's new rule which permits censorship of "derogatory and injurious remarks directed at students' minority status such as race, religion, and sexual orientation." App. 27a. The St. Paul ordinance was unconstitutional because it discriminated against viewpoint. "['F]ighting words' that do not themselves invoke race, color, creed, religion, or gender—aspersions upon a person's mother, for example—would seemingly be usable ad libitum in the placards of those arguing in favor of racial, color, etc., tolerance and equality, but could not be used by those speakers' opponents." *R.A.V.*, 505 U.S. at 391.

Under the Ninth Circuit's rule, derogatory and injurious remarks that are not directed at race, religion, or sexual orientation can be used by students arguing in favor of, for instance, tolerance and equality for those engaged in homosexual behavior, but not by those students like the Harpers who oppose such behavior.

Thus, a school could ***not*** ban a T-shirt saying all homophobic bigots are misbegotten,[5] but ***could*** ban one saying those who tolerate or engage in homosexual behavior are. *Id.* at 392. Indeed, the School permitted those students participating in the Day of Silence to use words like "fags," "queer," "that's so gay," and "loser," App. 180a, but prohibited Chase from using the much milder word, "shameful." The Ninth Circuit "has no such authority to license one side of a debate to fight freestyle,

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[5] Assuming for the moment that being "homophobic" or misbegotten are not "core characteristics" of a "minority," as these terms have yet to be defined by the Ninth Circuit.

while requiring the other to follow Marquis of Queensberry rules." *Id.*

III. THE NINTH CIRCUIT'S OPINION MUST BE VACATED FOR MOOTNESS IF KELSIE HARPER IS NOT PERMITTED TO INTERVENE FOR PURPOSES OF THIS PETITION.

Chase's sister, Kelsie Harper, has conditionally joined this petition by filing a motion to intervene concurrently with Chase's filing of this petition. If her motion is not granted, the request for a preliminary injunction will be moot because Chase graduated this past June. App. 311a-313a. In that event, the Ninth Circuit and district court opinions regarding Chase's motion for preliminary injunction should therefore be vacated. *See Anderson v. Green*, 413 U.S. 557, 560 (1995) (per curiam) (ordering such disposition of a moot case).

Under 28 U.S.C. § 2106, this Court has the authority to vacate any judgment brought before it for review, and may remand the case and direct the entry of any judgment "as may be just under the circumstances." When a civil case from a federal court has become moot while on its way to, or pending before, this Court, the "established practice" is to reverse or vacate the judgment and remand with a direction to dismiss. *Arizonans for Official English v. Arizona*, 520 U.S. 43, 71 (1997) (quoting *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950)). This course of action "has been followed in countless cases in this Court." *Great Western Sugar Co. v. Nelson*, 442 U.S. 92, 92 (1979).

Vacatur "clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented through happenstance." *Munsingwear*, 340 U.S. at 40. Vacatur is particularly appropriate here.

A. Vacatur is Necessary When the Appellant Does Not Intentionally Moot the Case.

Determining whether vacatur is appropriate is an equitable question, and the primary factor is the fault of the parties in causing the appeal to become moot. *U.S. Bancorp v. Bonner*, 513 U.S. 18, 25-26 (1994). If the party seeking relief does not intentionally cause the mootness, vacatur is appropriate. *Id.* at 25.

Chase's graduation from high school was the normal culmination of his education; it was not a deliberate effort to escape the consequences of the decision below. This Court has, on multiple occasions, vacated lower court decisions when a student's graduation rendered the appeal nonjusticiable. *E.g., DeFunis v. Odegaard*, 416 U.S. 312, 320 (1974); *Bd. of Sch. Comm'rs of Indianapolis*, 420 U.S. 128, 129-30 (1975). The courts of appeals have consistently done the same. *E.g., Donovan ex rel. Donovan v. Punxsutawney Area Sch. Bd.*, 336 F.3d 211, 218 (3d Cir. 2003); *Mellen v. Bunting*, 327 F.3d 355, 365 (4th Cir. 2003); *Murphy v. Fort Worth Indep. Sch. Dist.*, 334 F.3d 470, 471 (5th Cir. 2003); *Doe v. Madison Sch. Dist. No. 321*, 177 F.3d 789, 799 (9th Cir. 1999); *Cook v. Colgate Univ.*, 992 F.3d 17, 19-20 (2d Cir. 1993).

B. Vacatur is Necessary to Prevent an Unreviewable Decision From Acting as Law of the Case in Future Proceedings.

Although Chase's motion for preliminary injunction is now moot, Chase also seeks damages, and the remainder of the case is moving forward in the district court. This tilts the equities even further in favor of vacatur. Not only has his graduation stripped Chase of the ability to seek review of the Ninth Circuit's decision, but that decision will also be law of the case for his motion for summary judgment and any subsequent appeals. *See* 18B CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND

PROCEDURE § 4478.5 (2d ed. 2006) ("A fully considered appellate ruling on an issue of law made on a preliminary injunction appeal . . . [is] law of the case for further proceedings in the trial court on remand and in any subsequent appeal"). Thus, the risk of harm from an unreviewable decision is compounded.

Vacatur is the only way to ensure that the rights of all parties are preserved and that no one will be prejudiced by a decision that could not be reviewed. "The purpose of vacating a judgment when it becomes moot while awaiting review is to return the legal relationships of the parties to their status prior to initiation of the suit." *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 595 (1984) (Blackmun, J., dissenting). Moreover, the issues in this case will still be litigated and ruled upon—this time with a complete record—on the parties' cross-motions for summary judgment. The equities strongly favor vacating the lower courts' decisions.

This Court has already in other cases vacated the judgment of the Court of Appeals on a motion for preliminary injunction because the motion—but not the underlying case—had become moot. *See Univ. of Texas v. Camenisch*, 451 U.S. 390, 394 (1981); *Honig v. Students of California Sch. for the Blind*, 471 U.S. 148, 149-50 (1985). This Court should do the same here (if Kelsie's motion to intervene is not granted).

CONCLUSION

The Ninth Circuit has endorsed suffocating political correctness in our Nation's public schools. The School has taken sides in one of the greatest political, philosophical, and religious debates of our time. This Court should grant certiorari.

Alternatively, this Court should vacate the judgment of the United States Court of Appeals for the Ninth Circuit based on mootness, and remand the case to that court with

directions to (1) vacate the judgment of the district court with respect to Mr. Harper's motion for preliminary injunction, and (2) order the dismissal of Mr. Harper's motion for preliminary injunction as moot.

Respectfully submitted, October 26, 2006

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APPENDICES

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TYLER CHASE HARPER, a minor, by and through his parents Ron and Cheryl Harper; RON HARPER; CHERYL HARPER,

Plaintiffs-Appellants,

v.

POWAY UNIFIED SCHOOL DISTRICT; JEFF MANGUM; LINDA VANDERVEEN; PENNY RANFTYLE; STEVE MCMILLAN; ANDY PATAPOW, All Individually and in their official capacity as Members of the Board of the Poway Unified School District; DONALD A. PHILLIPS, Individually, and in his official capacity as Superintendent of the Poway Unified School District; SCOTT FISHER, Individually and in his official capacity as Principal of Poway High School; LYNELL ANTRIM, Individually and in her official capacity as Assistant Principal of Poway High School; ED GILES, Individually and in his official capacity as Vice Principal of Poway High School; DAVID LEMASTER, Individually and in his official capacity as Teacher of Poway High School; DOES 1 THROUGH 20, INCLUSIVE,

Defendants-Appellees.

No. 04-57037

D.C. No. CV-04-01103-JAH

OPINION

Appeal from the United States District Court
for the Southern District of California
John A. Houston, District Judge, Presiding

Argued and Submitted June 6, 2005
Pasadena, California

Filed April 20, 2006

Before: REINHARDT, KOZINSKI, and THOMAS, Circuit Judges.

REINHARDT, Circuit Judge:

May a public high school prohibit students from wearing T-shirts with messages that condemn and denigrate other students on the basis of their sexual orientation? Appellant in this action is a sophomore at Poway High School who was ordered not to wear a T-shirt to school that read, "BE ASHAMED, OUR SCHOOL EMBRACED WHAT GOD HAS CONDEMNED" handwritten on the front, and "HOMOSEXUALITY IS SHAMEFUL" handwritten on the back. He appeals the district court's order denying his motion for a preliminary injunction. Because he is not likely to succeed on the merits, we affirm the district court's order.

I. Factual Background[1]

Poway High School ("the School") has had a history of conflict among its students over issues of sexual orientation. In 2003, the School permitted a student group called the Gay-Straight Alliance to hold a "Day of Silence" at the

[1] These background facts are based on the limited record before us which includes five declarations by school officials, and declarations from Harper, his father, Ron Harper, and a fellow student, Joel Rhine.

School which, in the words of an Assistant Principal, is intended to "teach tolerance of others, particularly those of a different sexual orientation."[2] During the days surrounding the 2003 "Day of Silence,"[3] a series of incidents and altercations occurred on the school campus as a result of anti-homosexual comments that were made by students. One such confrontation required the Principal to separate students physically. According to David LeMaster, a teacher at Poway, several students were suspended as a result of these conflicts. Moreover, a week or so after the "Day of Silence," a group of heterosexual students informally organized a "Straight-Pride Day," during which they wore T-shirts which displayed derogatory remarks about homosexuals. According to Assistant Principal Lynell Antrim, some students were asked to remove the shirts and did so, while others "had an altercation and were suspended for their actions."

Because of these conflicts in 2003, when the Gay-Straight Alliance sought to hold another "Day of Silence" in 2004, the School required the organization to consult with the Principal to "problem solve" and find ways to reduce tensions and potential altercations. On April 21, 2004, the date of the 2004 "Day of Silence," appellant Tyler

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[2] In his complaint, Harper alleges that he believes "the true purpose" of the "Day of Silence" was "to endorse, promote and encourage homosexual activity."

[3] On the "Day of Silence," participating students wore duct tape over their mouths to symbolize the silencing effect of intolerance upon gays and lesbians; these students would not speak in class except through a designated representative. Some students wore black T-shirts that said "National Day of Silence" and contained a purple square with a yellow equal sign in the middle. The Gay-Straight Alliance, with the permission of the School, also put up several posters promoting awareness of harassment on the basis of sexual orientation.

Chase Harper wore a T-shirt to school on which "I WILL NOT ACCEPT WHAT GOD HAS CONDEMNED," was handwritten on the front and "HOMOSEXUALITY IS SHAMEFUL 'Romans 1:27'" was handwritten on the back. There is no evidence in the record that any school staff saw Harper's T-shirt on that day.

The next day, April 22, 2004, Harper wore the same T-shirt to school, except that the front of the shirt read "BE ASHAMED, OUR SCHOOL EMBRACED WHAT GOD HAS CONDEMNED," while the back retained the same message as before, "HOMOSEXUALITY IS SHAMEFUL 'Romans 1:27.'"[4] LeMaster, Harper's second period teacher, noticed Harper's shirt and observed "several students off-task talking about" the shirt. LeMaster, recalling the altercations that erupted as a result of "anti-homosexual speech" during the previous year's "Day of Silence," explained to Harper that he believed that the shirt was "inflammatory," that it violated the School's dress code, and that it "created a negative and hostile working environment for others." When Harper refused to remove his shirt and asked to speak to an administrator, LeMaster gave him a dress code violation card to take to the front office.

When Harper arrived at the front office, he met Assistant Principal Antrim. She told Harper that the "Day of Silence" was "not about the school promoting homosexuality but rather it was a student activity trying to raise other students' awareness regarding tolerance in their judgement [sic] of others." Antrim believed that Harper's shirt "was inflammatory under the circumstances

[4] A copy of a photograph of the T-shirt is attached as Exhibit A.

and could cause disruption in the educational setting." Like LeMaster, she also recalled the altercations that had arisen as a result of anti-homosexual speech one year prior. According to her affidavit, she "discussed [with Harper] ways that he and students of his faith could bring a positive light onto this issue without the condemnation that he displayed on his shirt." Harper was informed that if he removed the shirt he could return to class.

When Harper again refused to remove his shirt, the Principal, Scott Fisher, spoke with him, explaining his concern that the shirt was "inflammatory" and that it was the School's "intent to avoid physical conflict on campus." Fisher also explained to Harper that it was not healthy for students to be addressed in such a derogatory manner. According to Fisher, Harper informed him that he had already been "confronted by a group of students on campus" and was "involved in a tense verbal conversation" earlier that morning.[5] The Principal eventually decided that Harper could not wear his shirt on campus, a decision that, he asserts, was influenced by "the fact that during the previous year, there was tension on campus surrounding the Day of Silence between certain gay and straight students."[6] Fisher proposed some alternatives to wearing

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[5] In his affidavit, Harper characterized these conversations with other students as "peaceful discussions wherein differing viewpoints were communicated."

[6] We note that conflicts over homosexuality at Poway High School have not been limited to the incidents surrounding a "Day of Silence." Two former students recently won a suit against the School for failing to protect them from students who harassed them because they are gay. *See* Dana Littlefield, *Two Gay Students Were Harassed, Jury Finds*, San Diego Union-Trib., June 9, 2005, at B2. During the trial, one of the students testified that Poway "students repeatedly called him names, shoved him in the hallways, threw food at him and spit on him," and

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the shirt, all of which Harper turned down. Harper asked two times to be suspended. Fisher "told him that [he] did not want him suspended from school, nor did [he] want him to have something in his disciplinary record because of a stance he felt strongly about." Instead, Fisher told Harper that he would be required to remain in the front office for the remainder of the school day.

Harper spent the rest of the day in the school conference room doing his homework. At some point during that day, Deputy Sheriff Norman Hubbert, who served as the school resource officer for Poway High, came in to speak with Harper.[7] The complaint alleges that Hubbert "came to interrogate" Harper to "determine if he was a dangerous student." Hubbert, however, asserts in his affidavit that he and Harper had a "casual conversation concerning the content of the shirt . . . the Bible and [the] scripture reference on the shirt," and that the conversation was conducted "simpl[y out of] curiosity . . . to understand the situation."

Toward the end of the school day, Assistant Principal Ed Giles spoke with Harper. Giles had discovered earlier in the day that Harper attended the same church that he had previously attended, and that he "knew [Harper's] father personally and had attended Biblical studies that

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"that he heard other students make disparaging remarks about gays and lesbians on a nearly daily basis." *Id.*

[7] Hubbert, who is a detective with the San Diego County Sheriff, was on campus that day because someone, purporting to be a parent, had called the School that morning complaining about the School's "condoning" the "Day of Silence" and stated that "he and several other parents had 'had it' and 'would be doing something about it.'" Concerned about safety, Principal Fisher had requested Hubbert's presence on campus on that day.

[Harper's] father led on Tuesday nights." According to Giles, he went to speak with Harper "out of respect to [Harper] and his family" and "to make sure he was alright." Giles told Harper that he understood "where he was coming from" but wished that he could "express himself in a more positive way." Giles also said that he shared the same Christian faith as Harper, but that as a school employee, he had to watch how he expressed his beliefs and that when he came to work, he had to "leave his faith in [the] car." Giles then asked Harper to "consider other alternatives that would be more positive and non-confrontational," including sponsoring activities through the campus Bible Club.

After his conversation with Giles, Harper remained in the office for the last period of the day, after which he was instructed to proceed directly off campus. Harper was not suspended, no disciplinary record was placed in his file, and he received full attendance credit for the day.

II. Procedural History

On June 2, 2004, Harper filed a lawsuit in district court against Poway Unified School District and certain named individuals in their individual and official capacities. Harper alleged five federal causes of action – violations of his right to free speech, his right to free exercise of religion, the Establishment Clause, the Equal Protection Clause, and the Due Process Clause – and one state law claim based on California Civil Code § 52.1, which creates a private cause of action for the violation of individual federal and state constitutional rights. On June 22, 2004, the School filed a motion to dismiss, and on July 12, 2004, Harper filed a motion for a preliminary injunction seeking

to enjoin the school from "continuing [its] violation of the constitutional rights of Plaintiff Tyler Chase Harper." On November 4, 2004, the district court granted the School's motion to dismiss as to Harper's equal protection, due process,[8] and state law claims, but denied the motion as to his three First Amendment claims: freedom of speech, free exercise of religion, and establishment of religion. The district court also granted the School's motion to dismiss Harper's damages claims against Poway Unified School District and the individual defendants on the ground of qualified immunity. Finally, the district court denied Harper's motion for a preliminary injunction. Harper then filed an interlocutory appeal from the order denying the latter motion.[9]

III. Jurisdiction

We have jurisdiction to review the district court's denial of the preliminary injunction motion under 28 U.S.C. § 1292(a)(1).

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[8] The district court dismissed with prejudice only Harper's due process challenge.

[9] We note that on November 17, 2004, thirteen days after the district court rendered its decision and two days prior to filing his Notice of Appeal with this court, Harper filed a First Amended Verified Complaint adding his sister, Kelsie, who is a freshman at Poway High School, as a plaintiff. On February 23, 2005, the district court granted in part and denied in part the School's motion to dismiss the First Amended Complaint. Because the amended complaint is not before this court on appeal, we limit our review to Harper.

IV. Standard and Scope of Review

For a district court to grant a preliminary injunction, the moving party must demonstrate either "(1) a combination of probable success on the merits and the possibility of irreparable harm; or (2) that serious questions are raised and the balance of hardships tips in its favor." *A & M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1013 (9th Cir. 2001). "Each of these two formulations requires an examination of both the potential merits of the asserted claims and the harm or hardships faced by the parties." *Sammartano v. First Judicial Dist. Court*, 303 F.3d 959, 965 (9th Cir. 2002). "These two alternatives represent extremes of a single continuum, rather than two separate tests." *Sun Microsystems, Inc. v. Microsoft Corp.*, 188 F.3d 1115, 1119 (9th Cir. 1999) (citation and internal quotation marks omitted). Accordingly, "the greater the relative hardship to the moving party, the less probability of success must be shown." *Id.* (citation and internal quotation marks omitted).

The district court concluded, and the School concedes on appeal, that because Harper's First Amendment claims survived the motion to dismiss, Harper made the necessary showing of irreparable harm. *See Sammartano*, 303 F.3d at 973 (internal quotation marks omitted) ("[A] party seeking preliminary injunctive relief in a First Amendment context can establish irreparable injury sufficient to merit the grant of relief by demonstrating the existence of a colorable First Amendment claim."). The balance of hardships does not, however, tip in his favor.[10] Therefore,

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[10] The district court concluded that "balancing the needs of the School to keep all their students safe coupled with the foreseeable vision that other students may feel free to exhibit these types of

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the question is whether Harper demonstrated a likelihood of success on the merits as to any or all of his three First Amendment claims.

We review a district court's grant or denial of a preliminary injunction for abuse of discretion. *A & M Records, Inc.*, 239 F.3d at 1013. We will reverse "only where the district court abused its discretion or based its decision on an erroneous legal standard or on clearly erroneous findings of fact." *El Pollo Loco, Inc. v. Hashim*, 316 F.3d 1032, 1038 (9th Cir. 2003) (citation and internal quotation marks omitted). Where, as here, the appellant does not dispute the district court's factual findings, we are required to determine "whether the court employed the appropriate legal standards governing the issuance of a preliminary injunction and whether the district court correctly apprehended the law with respect to the underlying issues in the case." *A & M Records, Inc.*, 239 F.3d at 1013 (internal quotation and citation omitted). The district court's interpretation of the underlying legal principles is subject to de novo review. *Id.* We may affirm the district court's order "on any ground supported by the record even if it differs from the rationale of the district court." *Nat'l Wildlife Fed'n v. United States Army Corps of Eng'rs*, 384 F.3d 1163, 1170 (9th Cir. 2004).

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expressions that would interfere with the work of the school and violate the rights of others against [Harper's] interests does not tip the scales sharply in [Harper's] favor." As our analysis of *Tinker* below illustrates, not only does the balance of hardships not tip sharply in Harper's favor, but it does not tip in his favor at all.

V. Analysis

1. Freedom of Speech Claim

The district court concluded that Harper failed to demonstrate a likelihood of success on the merits of his claim that the School violated his First Amendment right to free speech because, under *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, the evidence in the record was sufficient to permit the school officials to "reasonably . . . forecast substantial disruption of or material interference with school activities." 393 U.S. 503, 514 (1969). Harper contends that the district court erred in rejecting his free speech claim on three grounds: (1) his speech is protected under the Supreme Court's holdings in *Tinker* and *Bethel Sch. Dist. v. Fraser,* 478 U.S. 675 (1986); (2) the School's actions and policies amount to viewpoint discrimination under *Rosenberger v. Rector & Visitors of Univ. of Va.,* 515 U.S. 819, 829 (1995); and (3) the School's dress code and speech policies are overbroad under *Bd. of Airport Comm'rs of Los Angeles v. Jews for Jesus, Inc.,* 482 U.S. 569, 574 (1987).[11] We affirm the district court's denial of the

[11] We need not rule upon the validity of the School's dress code or other anti-harassment policies in order to determine whether the district court abused its discretion in denying the preliminary injunction. Harper's motion for a preliminary injunction sought only to enjoin school officials "from continuing their violation of the constitutional rights of Plaintiff Tyler Chase Harper." The only violation alleged was that Harper was precluded from wearing his T-shirt with its demeaning message while at school. The motion did not seek to enjoin the enforcement of the School's dress code or any other school policies against any and all students, but sought only to stop the violation of Harper's purported constitutional right to wear his T-shirt. Our affirmance of the district court order does not depend upon the existence of a valid school policy or code. Under *Tinker,* the School is permitted to prohibit Harper's conduct, with or without a valid anti-harassment or other policy, if it can demonstrate that the restriction was necessary to

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requested preliminary injunction. Although we, like the district court, rely on *Tinker,* we rely on a different provision – that schools may prohibit speech that "intrudes upon . . . the rights of other students." *Tinker,* 393 U.S. at 508.

a. Student Speech Under *Tinker*

Public schools are places where impressionable young persons spend much of their time while growing up. They do so in order to receive what society hopes will be a fair and full education – an education without which they will almost certainly fail in later life, likely sooner rather than later. *See Brown v. Bd. of Educ.,* 347 U.S. 483, 493 (1954) ("[I]t is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education."). The public school, with its free education,

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prevent either the violation of the rights of other students or substantial disruption of school activities. The record is clear that even though Harper's teacher and Vice Principal Antrim stated that the T-shirt violated the dress code, the school officials made plain to Harper that the reason he could not wear the T-shirt was because of its effect upon other students and its disruptive effect upon the educational environment, rather than because it was prohibited by a dress code. The district judge apparently concluded that the validity of the School's anti-harassment policies was not before him, or that it was not necessary to decide that question, and we cannot say that his determination was unreasonable. Finally, we would prefer not to make even a preliminary judgment as to the constitutionality of the School's dress code or anti-harassment policies without the district court first having considered the question. Of course, following remand, the district court may do so at the appropriate time or upon the appropriate motion. In contrast, our dissenting colleague would have us engage on appeal in a sweeping examination *ab initio* of the validity of a complicated series of policies – an examination that would cause us to discuss prematurely a number of controversial constitutional issues. *See* dis. op. at 22-36. We see no need for such an exercise of our jurisdiction on this appeal.

is the key to our democracy. *See id.* (stating that public education "is the very foundation of good citizenship"). Almost all young Americans attend public schools.[12] During the time they do – from first grade through twelfth-students are discovering what and who they are. Often, they are insecure. Generally, they are vulnerable to cruel, inhuman, and prejudiced treatment by others.

The courts have construed the First Amendment as applied to public schools in a manner that attempts to strike a balance between the free speech rights of students and the special need to maintain a safe, secure and effective learning environment. *See, e.g., Tinker,* 393 U.S. at 507 (balancing the need for "scrupulous protection of Constitutional freedoms of the individual" against the need of schools to perform their proper educational function). This court has expressly recognized the need for such balance: "States have a compelling interest in their educational system, and a balance must be met between the First Amendment rights of students and preservation of the educational process." *LaVine v. Blaine Sch. Dist.,* 257 F.3d 981, 988 (9th Cir. 2001). Although public school students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," *Tinker,* 393 U.S. at 506, the Supreme Court has declared

[12] As of the fall of 2005, approximately eighty-eight percent of elementary and secondary students in the United States attended public schools. *See* DIGEST OF EDUCATION STATISTICS, 2004, NAT'L CTR. for EDUC. STATISTICS (2004), *available at* http://nces.ed.gov/programs/digest/d04/. Most of the rest attended religious schools. *See* STEPHEN P. BROUGHMAN & KATHLEEN W. PUGH, CHARACTERISTICS OF PRIVATE SCHOOLS IN THE UNITED STATES: RESULTS FROM THE 2001-2002 PRIVATE SCHOOL UNIVERSE SURVEY (U.S. Department of Education, National Center for Education Statistics) (2005).

that "the First Amendment rights of students in public schools are not automatically coextensive with the rights of adults in other settings, and must be applied in light of the special characteristics of the school environment."[13] *Hazelwood Sch. Dist. v. Kuhlmeier,* 484 U.S. 260, 266 (1988) (internal citation and quotation marks omitted). Thus, while Harper's shirt embodies the very sort of political speech that would be afforded First Amendment protection outside of the public school setting, his rights in the case before us must be determined "in light of [those] special characteristics." *Tinker,* 393 U.S. at 506.

This court has identified "three distinct areas of student speech," each of which is governed by different Supreme Court precedent: (1) vulgar, lewd, obscene, and plainly offensive speech which is governed by *Fraser,*[14] (2) school-sponsored speech which is governed by *Hazelwood,*[15] and (3) all other speech which is governed by *Tinker. Chandler v. McMinnville Sch. Dist.,* 978 F.2d 524, 529 (9th Cir. 1992) (internal citations omitted).

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[13] Although Harper correctly points out that California law provides greater protection for student speech than federal law, *see* Cal. Educ. Code § 48950(a), he did not raise a state law claim in his preliminary injunction motion before the district court. Nor did he question, as he does in his brief to us, the constitutionality of the correlative provisions of the California Education Code that provide greater protection than federal law against harassment of students on the basis of sexual orientation. *See* Cal. Educ. Code §§ 200, 201, 220. Accordingly, we do not rely on or resolve any state law questions here.

[14] Because we decide Harper's free speech claim on the basis of *Tinker,* we need not consider whether his speech was "plainly offensive" under *Fraser.*

[15] Neither party here claims that Harper's speech is "school-sponsored" and thus governed by *Hazelwood.*

In *Tinker,* the Supreme Court confirmed a student's right to free speech in public schools.[16] In balancing that right against the state interest in maintaining an ordered and effective public education system, however, the Court declared that a student's speech rights could be curtailed under two circumstances. First, a school may regulate student speech that would "impinge upon the rights of other students." *Tinker,* 393 U.S. at 509. Second, a school may prohibit student speech that would result in "substantial disruption of or material interference with school activities." *Id.* at 514. Because, as we explain below, the School's prohibition of the wearing of the demeaning T-shirt is constitutionally permissible under the first of the *Tinker* prongs, we conclude that the district court did not abuse its discretion in finding that Harper failed to demonstrate a likelihood of success on the merits of his free speech claim.[17]

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[16] In *Tinker,* the Supreme Court held that a public school could not ban students from wearing black armbands protesting the Vietnam war where the "silent, passive expression of opinion [was] unaccompanied by any disorder or disturbance," and there was no evidence that the display "colli[ded] with the rights of other students to be secure and to be let alone." 393 U.S. at 508.

[17] The first part of our colleague's dissent is devoted to a discussion of whether there was sufficient evidence that the wearing of Harper's T-shirt caused substantial disruption, the *Tinker* prong on which the district court relied but which is not relevant to our holding. *See* dis. op. at 3-9. The last part of the dissent also deals with a subject we need not and do not address: what the dissent terms the School's "harassment policy." *Id.* at 22-36; *see also supra* n. 11. Oddly, the dissent spends only a relatively minor part of its discussion on the determinative issue here, the impermissible intrusion on the rights of gay and lesbian students. *Id.* at 13-22. Even more oddly, in its Conclusion the dissent suggests that speech that is fundamentally offensive to minority students may be constitutionally limited and quarrels only with whether such a limitation is consistent with the wording of *Tinker. Id.* at 36-37. It also

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i. The Rights of Other Students

In *Tinker,* the Supreme Court held that public schools may restrict student speech which "intrudes upon . . . the rights of other students" or "colli[des] with the rights of other students to be secure and to be let alone." 393 U.S. at 508. Harper argues that *Tinker*'s reference to the "rights of other students" should be construed narrowly to involve only circumstances in which a student's right to be free from direct physical confrontation is infringed. Drawing on the Fifth Circuit's opinion in *Blackwell v. Issaquena County Bd. of Ed.,* 363 F.2d 749, 751 (5th Cir. 1966), which the Supreme Court cited in *Tinker,* Harper contends that because the speakers in *Blackwell* "accosted other students by pinning the buttons on them even though they did not ask for one," a student must be physically accosted in order to have his rights infringed.

Notwithstanding the facts of *Blackwell,* the law does not support Harper's argument. This court has explained that vulgar, lewd, obscene, indecent, and plainly offensive speech "by definition, may well 'impinge[] upon the rights of other students,'" even if the speaker does not directly accost individual students with his remarks. *Chandler,* 978 F.2d at 529 (quoting *Tinker,* 393 U.S. at 509). So too may other speech capable of causing psychological injury. The Tenth Circuit has held that the "display of the Confederate flag might . . . interfere with the rights of other students to be secure and let alone," even though there was no indication that any student was physically

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suggests that the Supreme Court might properly modify *Tinker* and validate our holding. *Id.* at 37. We disagree that any modification of *Tinker* is required or desirable. All that is necessary is a fair reading of its plain language, as we explain in the following section.

accosted with the flag, aside from its general display. *West v. Derby Unified Sch. Dist.*, 206 F.3d 1358, 1366 (10th Cir. 2000). While "[t]he precise scope of *Tinker*'s 'interference with the rights of others' language is unclear," *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 217 (3rd Cir. 2001), we unequivocally reject Harper's overly narrow reading of the phrase.

We conclude that Harper's wearing of his T-shirt "colli[des] with the rights of other students" in the most fundamental way. *Tinker*, 393 U.S. at 508. Public school students who may be injured by verbal assaults on the basis of a core identifying characteristic such as race, religion, or sexual orientation, have a right to be free from such attacks while on school campuses. As *Tinker* clearly states, students have the right to "be secure and to be let alone." *Id.* Being secure involves not only freedom from physical assaults but from psychological attacks that cause young people to question their self-worth and their rightful place in society.[18] The "right to be let alone" has been recognized by the Supreme Court, of course, as "'the most comprehensive of rights and the right most valued by civilized men.'" *Hill v. Colorado*, 530 U.S. 703, 716-17 (2000) (quoting *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)). Indeed, the "recognizable privacy interest in avoiding unwanted communication" is perhaps

[18] There is nothing in *Tinker* that remotely supports the dissent's contention that the rights to "be secure and to be let alone" are limited to rights such as those that protect against "assault, defamation, invasion of privacy, extortion and blackmail." Dis. op. at 14. Security and privacy entail far more than freedom from those torts. Nor does the dissent offer any reason why the rights to security and privacy do not include freedom from verbal assaults that cause psychological injury to young people.

most important "when persons are 'powerless to avoid' it." *Id.* at 716 (quoting *Cohen v. California,* 403 U.S. 15, 21-22 (1971)). Because minors are subject to mandatory attendance requirements, the Court has emphasized "the obvious concern on the part of parents, and school authorities acting *in loco parentis,* to protect children – especially in a captive audience. . . . " *Fraser,* 478 U.S. at 684. Although name-calling is ordinarily protected outside the school context, "[s]tudents cannot hide behind the First Amendment to protect their 'right' to abuse and intimidate other students at school." *Sypniewski v. Warren Hills Reg'l Bd. of Educ.,* 307 F.3d 243, 264 (3rd Cir. 2002).

Speech that attacks high school students who are members of minority groups that have historically been oppressed, subjected to verbal and physical abuse, and made to feel inferior, serves to injure and intimidate them, as well as to damage their sense of security and interfere with their opportunity to learn.[19] The demeaning of young gay and lesbian students in a school environment is detrimental not only to their psychological health and well-being, but also to their educational development. Indeed, studies demonstrate that "academic underachievement, truancy, and dropout are prevalent among homosexual youth and are the probable consequences of violence and verbal and physical abuse at school." Susanne M. Stronski Huwiler and Gary Remafedi, *Adolescent*

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[19] California law provides that "[a]ll pupils have the right to participate fully in the educational process, free from discrimination and harassment." Cal. Educ. Code § 201(a). The dissent expostulates on the meaning of the term "harassment" and speculates as to whether the California statute may be contrary to the First Amendment, all of which is irrelevant here because we do not rely on the statute in reaching our decision. *See* dis. op. at 13-15.

Homosexuality, 33 REV. JUR. U.I.P.R. 151, 164 (1999); *see also* Thomas A. Mayes, *Confronting Same-Sex, Student-to-Student Sexual Harassment: Recommendations for Educators and Policy Makers,* 29 FORDHAM URB. L.J. 641, 655 (2001) (describing how gay students are at a greater risk of school failure and dropping out, most likely as a result of "social pressure and isolation"); Amy Lovell, *"Other Students Always Used to Say, 'Look At The Dykes'": Protecting Students From Peer Sexual Orientation Harassment,* 86 CAL. L. REV. 617, 625-28 (1998) (summarizing the negative effects on gay students of peer sexual orientation harassment). One study has found that among teenage victims of anti-gay discrimination, 75% experienced a decline in academic performance, 39% had truancy problems and 28% dropped out of school. *See* Courtney Weiner, Note, *Sex Education: Recognizing Anti-Gay Harassment as Sex Discrimination Under Title VII and Title IX,* 37 COLUM. HUM. RTS. L. REV. 189, 221-25 (2005). Another study confirmed that gay students had difficulty concentrating in school and feared for their safety as a result of peer harassment, and that verbal abuse led some gay students to skip school and others to drop out altogether. HUMAN RIGHTS WATCH, HATRED IN THE HALLWAYS (1999), http://hrw.org/reports/2001/uslgbt/Final-05.htm#P609_91364. Indeed, gay teens suffer a school dropout rate over three times the national average. NAT'L MENTAL HEALTH ASS'N, BULLYING IN SCHOOLS: HARASSMENT PUTS GAY YOUTH AT RISK, http://www.nmha.org/pbedu/backtoschool/bullyingGayYouth.pdf; *see also* Maurice R. Dyson, *Safe Rules or Gays' Schools? The Dilemma of Sexual Orientation Segregation in Public Education,* 7 U. PA. J. CONST. L. 183, 187 (2004) (gay teens face greater risks of "dropping out [and] performing poorly in school"); Kelli Armstrong, *The Silent Minority Within a Minority: Focusing on the Needs of Gay*

Youth in Our Public Schools, 24 GOLDEN GATE U. L. REV. 67, 76-77 (1994) (describing how abuse by peers causes gay youth to experience social isolation and drop out of school). In short, it is well established that attacks on students on the basis of their sexual orientation are harmful not only to the students' health and welfare, but also to their educational performance and their ultimate potential for success in life.

Those who administer our public educational institutions need not tolerate verbal assaults that may destroy the self-esteem of our most vulnerable teenagers and interfere with their educational development.[20] *See Muller by Muller v. Jefferson Lighthouse Sch.*, 98 F.3d 1530, 1540 (7th Cir. 1996) (stating that elementary schools may restrict speech "that could crush a child's sense of self-worth"); *Saxe*, 240 F.3d at 217 (observing that speech that "substantially interfer[es] with a student's educational performance" may satisfy the *Tinker* standard).[21] To the contrary, the School had a valid and lawful basis for

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[20] In fact, California schools like Poway High are required by law "to minimize and eliminate a hostile environment on school grounds that impairs the access of pupils to equal educational opportunity." Cal. Educ. Code § 201(f).

[21] *Saxe* considered the validity of a school district's anti-harassment policy, a question we do not address here. *See supra* n.11. Although in its discussion of a provision regarding "hostile environment," *Saxe* briefly alludes to the "interference with the rights of others" prong of *Tinker*, it appears to conflate that prong with the "substantial disruption" prong and to suggest, perhaps inadvertently, that injurious slurs may not be prohibited unless they also cause substantial disruption. *See Saxe*, 240 F.3d at 217. That clearly is not the case. The two *Tinker* prongs are stated in the alternative. *See Tinker*, 393 U.S. at 508. We agree, however, with *Saxe*'s conclusion that "it is certainly not enough that the speech is merely offensive to some listener." *Saxe*, 240 F.3d at 217.

restricting Harper's wearing of his T-shirt on the ground that his conduct was injurious to gay and lesbian students and interfered with their right to learn.[22]

The dissent claims that we should not take notice of the fact that gay students are harmed by derogatory messages such as Harper's because there is no "evidence" that they are in fact injured by being shamed or humiliated by their peers. *See* dis. op. at 15-18. It is simply not a novel concept, however, that such attacks on young minority students can be harmful to their self-esteem and to their ability to learn. As long ago as in *Brown v. Board of Education,* the Supreme Court recognized that "[a] sense of inferiority affects the motivation of a child to learn." 347 U.S. at 494 (internal quotation marks omitted). If a school permitted its students to wear shirts reading, "Negroes: Go Back To Africa," no one would doubt that the message would be harmful to young black students. So, too, in the case of gay students, with regard to messages such as

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[22] As noted *supra,* California law explicitly recognizes the right of students to be free from harassment on the basis of sexual orientation. *See* Cal. Educ. Code § 200, 201. These provisions were enacted not in a vacuum, but out of a recognition on the part of the state legislature of "an urgent need to prevent and respond to acts of hate violence and bias-related incidents that are occurring at an increasing rate in California's public schools." *Id.* at § 201(d). We also observe that federal law provides public school students some protection against harassment and discriminatory treatment based on sexual orientation. For example, in *Flores v. Morgan Hill Unified Sch. Dist.,* 324 F.3d 1130, 1134-35 (9th Cir. 2003), we held that the Equal Protection Clause protects against school districts' indifference to certain kinds of negative speech aimed at gay students. *See also* Mayes, *supra,* at 643 (observing that harassment based on sexual orientation may be actionable under Title IX as harassment based on sex).

those written on Harper's T-shirt.[23] As our dissenting colleague recently concluded, "[y]ou don't need an expert witness to figure out" the self-evident effect of certain policies or messages. *Jespersen v. Harrah's Operating Co., Inc.*, No. 03-15045, 2006 WL 962533, at *13 (9th Cir. April 14, 2006) (Kozinski, Circuit Judge, dissenting). Just as Judge Kozinski found it to be "perfectly clear" – *without the aid of any evidence in the record* – that an employer's makeup requirement burdened women, the fact that Harper's demeaning statement is harmful to gay students at Poway High "hardly seem[s] like [a] question[] reasonably subject to dispute." *Id.* at *12. One would think that if we should be able to take notice of how long it takes women to put on makeup, or that makeup is an expensive item, we can certainly take notice that it is harmful to gay teenagers to be publicly degraded and called immoral and shameful.[24] Certainly, the California legislature had no

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[23] There is much literature to this effect. *See supra* pp. 21-23. Our dissenting colleague's notion of "evidence" appears to be rather odd. It seems to consist largely of motion pictures and television shows. The dissent draws conclusions that it is "not unusual in a high school classroom for students to be 'off-task'" and that politics and other subjects "are the ordinary subjects of discourse in high school corridors" on the basis of our colleague's viewing of a number of popular entertainment features. *See* dis. op. at 4 n.2 & 5 n.3. Perhaps he would prefer us to cite *Brokeback Mountain* (Paramount Pictures 2005) or *The Matthew Shepard Story* (2002), as evidence of the harmful effects of anti-gay harassment rather than simply stating that which, to anyone familiar with or in any way sensitive to, the history or effect of discrimination, is a self-evident fact.

[24] We should point out that we are considering here whether to reverse a denial of a preliminary injunction. The extent to which a self-evident proposition must be established in order to avoid such a reversal under an abuse of discretion standard is not necessarily the same as may be required at a trial on the merits, although we express no view on the latter question.

difficulty in determining that harassment on the basis of sexual orientation adversely affects the rights of public high school students. *See* Cal. Educ. Code § 201(c).[25]

The dissent takes comfort in the fact that there is a political disagreement regarding homosexuality in this country. *See* dis. op. at 12. We do not deny that there is, just as there was a longstanding political disagreement about racial equality that reached its peak in the 1950's and about whether religious minorities should hold high office that lasted at least until after the 1960 presidential election,[26] or whether blacks or Jews should be permitted to attend private universities and prep schools, work in various industries such as banks, brokerage houses, and Wall Street law firms, or stay at prominent resorts or hotels. Such disagreements may justify social or political debate, but they do not justify students in high schools or elementary schools assaulting their fellow students with demeaning statements: by calling gay students shameful,

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[25] Although we do not rely on the California statute to support our holding, we note that the Legislature, in the California Schools Hate Violence Reduction Act of 1995, declared: "Harassment on school grounds directed at an individual on the basis of personal characteristics or status creates a hostile environment and *jeopardizes equal educational opportunity* as guaranteed by the California Constitution and the United States Constitution." Cal. Educ. Code. § 201(c) (emphasis added).

[26] For example, in the late 19th century, James G. Blaine ran for President in a campaign that is remembered for its slogan of "Rum, Romanism and Rebellion." *See* Richard G. Bacon, *Rum, Romanism and Romer*, 6 DEL. L. REV. 1, 39-40 (2003); *see also* Joseph P. Viteritti, *Davey's Plea: Blaine, Blair, Witters, and the Protection of Religious Freedom*, 27 HARV. J.L. & PUB. POL'Y 299, 311 (2003) (citation omitted) (observing that Blaine's campaign for the Republican nomination "was built around his (and the party's) opposition to 'Rum, Romanism, and Rebellion.' ").

by labeling black students inferior or by wearing T-shirts saying that Jews are doomed to Hell. Perhaps our dissenting colleague believes that one can condemn homosexuality without condemning homosexuals. If so, he is wrong. To say that homosexuality is shameful is to say, necessarily, that gays and lesbians are shameful. There are numerous locations and opportunities available to those who wish to advance such an argument. It is not necessary to do so by directly condemning, to their faces, young students trying to obtain a fair and full education in our public schools.

Our dissenting colleague also appears to believe that the fact that Harper wore his T-shirt in response to a "Day of Silence" somehow lessens the injurious effect of his act because by participating in the gay rights event, gay students "perforce acknowledge that their status is not universally admired or respected." Dis. op. at 19. This argument is completely without merit. The fact that gays, or for that matter blacks, Jews, or Latinos, recognize that they are the subject of prejudice and are not "respected" or considered equal by some in certain public schools in this country does not mean that they are not injured when the usually unspoken prejudice turns into harmful verbal conduct. Moreover, the dissent's assertion that gay students may prefer to see the demeaning statements contained on Harper's T-shirt rather than on bathroom walls makes even less sense. *See id.* The First Amendment does not justify students launching such injurious and harmful personal attacks in either location.

What we hold in this opinion is a far cry from what the dissent suggests. We do not hold that schools may "define civic responsibility and then ban opposing points of view." *Id.* at 10 n.7. The question of what types of assemblies schools should or may conduct regarding

controversial public issues or what types of speech students may otherwise generally engage in regarding such issues is not before us. Different circumstances require different results. We consider here only whether schools may prohibit the wearing of T-shirts on high school campuses and in high school classes that flaunt demeaning slogans, phrases or aphorisms relating to a core characteristic of particularly vulnerable students and that may cause them significant injury. We do not believe that the schools are forbidden to regulate such conduct. Nor, contrary to the dissent, do we believe that because a school sponsors or permits a "Day of Tolerance" or a "Day of Silence" minority students should be required to publicly "[c]onfront[ ]" and "refut[e]" demeaning verbal assaults on them – that they may be left with no option other than to try to justify their sexual practices to the entire student body or explain to all their fellow students why they are not inferior or evil. *Id.* at 19. The First Amendment does not require that young students be subjected to such a destructive and humiliating experience.

In his declaration in the district court, the school principal justified his actions on the basis that "any shirt which is worn on campus which speaks in a derogatory manner towards an individual or group of individuals is not healthy for young people. . . . " If, by this, the principal meant that all such shirts may be banned under *Tinker*, we do not agree. T-shirts proclaiming, "Young Republicans Suck," or "Young Democrats Suck," for example, may not be very civil but they would certainly not be sufficiently damaging to the individual or the educational process to warrant a limitation on the wearer's First Amendment rights. Similarly, T-shirts that denigrate the President, his administration, or his policies, or otherwise invite political

disagreement or debate, including debates over the war in Iraq, would not fall within the "rights of others" *Tinker* prong.[27]

Although we hold that the School's restriction of Harper's right to carry messages on his T-shirt was permissible under *Tinker,* we reaffirm the importance of preserving student speech about controversial issues generally and protecting the bedrock principle that students "may not be confined to the expression of those sentiments that are officially approved." *Tinker,* 393 U.S. at 511; *see also Fraser,* 478 U.S. at 681 (noting students' "freedom to advocate unpopular and controversial views in schools and classrooms"). It is essential that students have the opportunity to engage in full and open political expression, both in and out of the school environment. Engaging in controversial political speech, even when it is offensive to others, is an important right of all Americans and learning the value of such freedoms is an essential part of a public school education. Indeed, the inculcation of "the fundamental values necessary to the maintenance of a democratic political system" is "truly the 'work of the schools.'" *Fraser,* 478 U.S. at 683 (quoting *Tinker,* 393 U.S. at 508). Limitations on student speech must be narrow, and applied with sensitivity and for reasons that are consistent with the fundamental First Amendment

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[27] The dissent suggests that our decision might somehow allow a school to restrict student T-shirts that voice strongly-worded opposition to the war in Iraq. *See* dis. op. at 12. That is not so. Our colleague ignores the fact that our holding is limited to injurious speech that strikes at a core identifying characteristic of students on the basis of their membership in a minority group. The anti-war T-shirts posited by the dissent constitute neither an attack on the basis of a student's core identifying characteristic nor on the basis of his minority status.

mandate. Accordingly, we limit our holding to instances of derogatory and injurious remarks directed at students' minority status such as race, religion, and sexual orientation.[28] Moreover, our decision is based not only on the type and degree of injury the speech involved causes to impressionable young people, but on the locale in which it takes place. *See Tinker,* 393 U.S. at 506 (student rights must be construed "in light of the special characteristics of the school environment"). Thus, it is limited to conduct that occurs in public high schools (and in elementary schools). As young students acquire more strength and maturity, and specifically as they reach college age, they become adequately equipped emotionally and intellectually to deal with the type of verbal assaults that may be prohibited during their earlier years. Accordingly, we do not condone

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[28] We do not consider here whether remarks based on gender warrant similar treatment, preferring to leave that question to another time. We recognize, however, that problems of gender discrimination remain serious and that they exist throughout learning institutions, from the public and religious schools to institutions of higher learning, not excluding the most prominent institutions in the nation.

Our dissenting colleague worries that offensive words directed at majority groups such as Christians or whites will not be covered by our holding. *See* dis. op. at 21. There is, of course, a difference between a historically oppressed minority group that has been the victim of serious prejudice and discrimination and a group that has always enjoyed a preferred social, economic and political status. Growing up as a member of a minority group often carries with it psychological and emotional burdens not incurred by members of the majority. In any event, any verbal assault targeting majorities that might justify some form of action by school officials is more likely to fall under the "substantial disruption" prong of *Tinker* or under the *Fraser* rule permitting schools to prohibit "plainly offensive" speech. 478 U.S. at 683; *cf. Frederick v. Morse,* 439 F.3d 1114, 1122 n.44 (9th Cir. 2006) (observing that *Fraser* "only enables schools to prevent the sort of vulgar, obscene, lewd or sexual speech that, specially with adolescents, readily promotes disruption").

the use in public colleges or other public institutions of higher learning of restrictions similar to those permitted here.

Finally, we emphasize that the School's actions here were no more than necessary to prevent the intrusion on the rights of other students. Aside from prohibiting the wearing of the shirt, the School did not take the additional step of punishing the speaker: Harper was not suspended from school nor was the incident made a part of his disciplinary record.

Under the circumstances present here, we conclude that the School's actions did not extend beyond the scope of the restrictions permitted by *Tinker*, and that the district court did not abuse its discretion in finding that Harper failed to demonstrate a likelihood of success on the merits of his free speech claim.

ii. **Substantial Disruption**

The district court concluded that Harper had failed to demonstrate a likelihood of success on the merits of his free speech claim because there was sufficient evidence to permit the school officials to "reasonably . . . forecast substantial disruption of or material interference with school activities." *Tinker*, 393 U.S. at 514. In so holding, the district court relied on the declarations of Principal Fisher, Assistant Principal Antrim, and LeMaster which described how the previous year's "Day of Silence" had resulted in "volatile behavior" and "tensions between students," including physical altercations. The court also cited LeMaster's testimony that he had observed disruption in the class that Harper attended while wearing the T-shirt, and Principal Fisher's testimony that Harper told

him that a "tense verbal conversation with a group of students" had already taken place due to the T-shirt's message.

In light of our conclusion regarding the application of the "rights of others" prong of *Tinker*, we have no cause to decide whether the evidence would be sufficient to warrant denial of a preliminary injunction under the "substantial disruption" prong as well.[29]

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[29] Our recent decision in *Frederick v. Morse*, 439 F.3d 1114 (9th Cir. 2006), is in no respect inconsistent with this opinion. In *Frederick*, we held that a public high school's suspension of a student for displaying off campus, during the running of the Winter Olympics Torch Relay, a banner that read "Bong Hits 4 Jesus," violated *Tinker*. *Frederick* differs from the present case in four fundamental ways. First and foremost, *Frederick* did not address the "intrudes upon the rights of others" prong of *Tinker*, the ground upon which we base our holding here. Rather, the only issue in *Frederick* was whether the other *Tinker* prong – "substantial disruption" – was applicable. Second, in *Frederick* we concluded that the school's actions did not meet the "substantial disruption" prong because the school officials conceded that they punished the student's display of the banner *not* out of "concern that it would cause disruption" but because "the speech promotes a social message contrary to the one favored by the school." *Id.* at 1117-18. Here, although in view of our holding, we need not (and do not) consider the "substantial disruption" prong of *Tinker*, the School presented evidence that it restricted Harper's wearing of the T-shirt because it expected that his doing so would cause substantial disruption. Third, *Frederick* involved punishing student speech that took place "outside the classroom, across the street from the school, during a non-curricular activity that was only partially supervised by school officials." *Id.* at 1123. By contrast, Harper wore the offending T-shirt not only on campus, but inside the classroom. Finally, in the case before us, the School adopted the least restrictive means of curing the injury; it simply forbade the wearing of the garment. In *Frederick*, in contrast, the school authorities punished the student harshly for the purported (but non-existent) offense by suspending him for ten days. *Id.* at 1116.

b. Viewpoint Discrimination

In reaching our decision that Harper may lawfully be prohibited from wearing his T-shirt, we reject his argument that the School's action constituted impermissible viewpoint discrimination. The government is generally prohibited from regulating speech "when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Rosenberger,* 515 U.S. at 829. However, as the district court correctly pointed out, speech in the public schools is not always governed by the same rules that apply in other circumstances. *See Hazelwood,* 484 U.S. at 266; *Fraser,* 478 U.S. at 685; *West,* 206 F.3d at 1366 (schools may ban student speech that "could well be considered a form of political speech to be afforded First Amendment protection outside the educational setting"). Indeed, the Court in *Tinker* held that a school may prohibit student speech, even if the consequence is viewpoint discrimination, if the speech violates the rights of other students or is materially disruptive. *See Tinker,* 393 U.S. at 511 (stating school cannot prohibit "expression of one particular opinion" unless it makes a specific showing of constitutionally valid reasons); *see also Porter v. Ascension Parish Sch. Bd.,* 393 F.3d 608, 615 (5th Cir. 2004) (stating that *Tinker* "applies to school regulations directed at specific student viewpoints"); *Muller by Muller,* 98 F.3d at 1538 (emphasis added) (observing difference between suppressing religious speech "solely because it is religious" and suppressing speech that is "religious *and* disruptive or hurtful"). Thus, pursuant to *Tinker,* courts have allowed schools to ban the display of Confederate flags despite the fact that such a ban may constitute viewpoint discrimination. *See Scott,* 324 F.3d at 1248 (upholding ban on Confederate flag

where school officials presented evidence of racial tensions at the school); *West,* 206 F.3d at 1366 (same). While the Confederate flag may express a particular viewpoint, "[i]t is not only constitutionally allowable for school officials" to limit the expression of racially explosive views, "it is their duty to do so." *Scott,* 324 F.3d at 1249. Because, as we have already explained, the record demonstrates that Harper's speech intruded upon the rights of other students, the School's restriction is permissible under *Tinker,* and we must reject Harper's viewpoint discrimination claim.[30]

The dissent claims that although the School may have been justified in banning discussion of the subject of sexual orientation altogether, it cannot "gag[] only those who oppose the Day of Silence." Dis. op. at 11. As we have explained, however, although *Tinker* does not allow schools to restrict the non-invasive, non-disruptive expression of political viewpoints, it does permit school authorities to restrict "one particular opinion" if the expression would "impinge upon the rights of other students" or substantially disrupt school activities. *Tinker,* 393 U.S. at 509, 511. Accordingly, a school may permit students to discuss a particular subject without being required to allow them to

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[30] The cases on which Harper relies to support his viewpoint discrimination claim involve the entirely different question whether schools may deny student groups access to school resources on the basis of their religious viewpoint. *See Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.,* 508 U.S. 384, 386-87 (1993) (school allowed use of school facilities for private groups, but prohibited "meetings for religious purposes"); *Prince v. Jacoby,* 303 F.3d 1074, 1090 (9th Cir. 2002) (school allowed student clubs access to school facilities but excluded student Bible club). Those cases are not relevant here.

launch injurious verbal assaults that intrude upon the rights of other students.

"A school need not tolerate student speech that is inconsistent with its basic educational mission, [] even though the government could not censor similar speech outside the school." *Hazelwood Sch. Dist. v. Kuhlmeier,* 484 U.S. 260, 266 (1988) (citation and internal quotation marks omitted). Part of a school's "basic educational mission" is the inculcation of "fundamental values of habits and manners of civility essential to a democratic society." *Fraser,* 478 U.S. at 681 (internal quotation marks omitted). For this reason, public schools may permit, and even encourage, discussions of tolerance, equality and democracy without being required to provide equal time for student or other speech espousing intolerance, bigotry or hatred. As we have explained, *supra* pp. 28-29, because a school sponsors a "Day of Religious Tolerance," it need not permit its students to wear T-shirts reading, "Jews Are Christ-Killers" or "All Muslims Are Evil Doers." Such expressions would be "wholly inconsistent with the 'fundamental values' of public school education." *Id.* at 685-86. Similarly, a school that permits a "Day of Racial Tolerance," may restrict a student from displaying a swastika or a Confederate Flag. *See West,* 206 F.3d at 1365-66. In sum, a school has the right to teach civic responsibility and tolerance as part of its basic educational mission; it need not as a quid pro quo permit hateful and injurious speech that runs counter to that mission.[31]

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[31] We note, incidentally, that the incident in question occurred on the day after the "Day of Silence," and not on the day itself.

We again emphasize that we do not suggest that all debate as to issues relating to tolerance or equality may be prohibited. As we have stated repeatedly, we consider here only the question of T-shirts, banners, and other similar items bearing slogans that injure students with respect to their core characteristics. Other issues must await another day.

2. Free Exercise of Religion Claim

Harper also contends that the district court erred because he was entitled to a preliminary injunction as a result of the School's violation of his rights under the Free Exercise Clause. He asserts that his wearing of the T-shirt was "motivated by sincerely held religious beliefs" regarding homosexuality[32] and that the School "punished" him for expressing them, or otherwise burdened the exercise of those views. Additionally, Harper argues that the School "attempted to change" his religious views and that this effort violated both the Free Exercise Clause and the Establishment Clause.

The Free Exercise Clause of the First Amendment provides that Congress shall make no law "prohibiting the free exercise" of religion. U.S. Const. amend. I. The Clause

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[32] We do not, of course, consider whether Harper's views are consistent with his religion, nor do we ask whether his religion truly encourages homophobic conduct. Similarly, we do not consider whether the isolated excerpt from the New Testament, *Romans 1:27*, is representative of Christian doctrine generally. All such inquiries are beyond the judiciary's authority. *See Hernandez v. C.I.R.*, 490 U.S. 680, 699 (1989) ("It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds.")

prohibits the government from "compel[ling] affirmation of religious belief, punish[ing] the expression of religious doctrines it believes to be false, impos[ing] special disabilities on the basis of religious views or religious status, or lend[ing] its power to one or the other side in controversies over religious authority or dogma." *Employment Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872, 877 (1990) (internal quotation marks and citations omitted).

In *Sherbert v. Verner*, the Supreme Court held that governmental actions that substantially burden a religious belief or practice must be justified by a compelling state interest and must be narrowly tailored to serve that interest. 374 U.S. 398, 402-03 (1963). The *Sherbert* test was later largely discarded in *Smith*, which held that the "right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" 494 U.S. 872, 879 (1990) (citation omitted). The Court held that a neutral law of general applicability need not be supported by a compelling governmental interest even though it has the incidental effect of burdening religion. *See id.* at 885; *see also Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993).[33] The Court noted, however, that a "hybrid claim," *i.e.*, a claim that involves "not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with

[33] "A law is one of neutrality and general applicability if it does not aim to 'infringe upon or restrict practices because of their religious motivation,' and if it does not 'in a selective manner impose burdens only on conduct motivated by religious belief[.]'" *San Jose Christian Coll. v. City of Morgan Hill*, 360 F.3d 1024, 1031 (9th Cir. 2004) (quoting *Lukumi*, 508 U.S. at 546).

other constitutional protections, such as freedom of speech," merits application of strict scrutiny: the law or action must be narrowly tailored to advance a compelling government interest. *Smith,* 494 U.S. at 881; *see also Miller v. Reed,* 176 F.3d 1202, 1207 (9th Cir. 1999) (same). Although it did not say so expressly, in *Smith* the Court preserved the *Sherbert* test for use in hybrid-rights cases. In order, however, "to assert a hybrid-rights claim, a free exercise plaintiff must make out a colorable claim that a companion right has been violated – that is, a fair probability or a likelihood, but not a certitude, of success on the merits." *Miller,* 176 F.3d at 1207 (internal citation and quotation marks omitted).

Harper does not contend that the School's prohibition against his wearing his T-shirt was motivated by other than secular reasons or that it was applied to him because of his religious views. Nor is there anything in the record to suggest that other students wearing T-shirts similarly demeaning of gay and lesbian members of the student body would be treated differently, Christians or not.[34] Under *Smith,* Harper's claim would surely fail. Harper asserts, however, that we should apply *Sherbert*'s strict scrutiny test to his free exercise claim because his is a "hybrid" claim involving the Free Exercise Clause in conjunction with other constitutional claims.[35] The School disagrees, arguing that the district court properly applied rational basis review under *Smith* because its prohibition

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[34] Harper does not argue that the School's ban on his wearing the injurious and demeaning T-shirt was arbitrary or capricious, only that it violated the First Amendment rights discussed herein.

[35] Although Harper refers to "other constitutional claims" and even "numerous constitutional claims," the only claim that has the potential to justify his invoking of "hybrid" status is the free speech claim.

of Harper's speech involved a "valid and neutral [rule] of general applicability."[36] *Smith*, 494 U.S. at 879.

We seriously doubt that there is "a fair probability or a likelihood" that Harper's claim that a companion right – free speech – has been violated will succeed on the merits, as required by *Miller*. 176 F.3d at 1207 (internal quotation marks omitted).[37] In fact, we are fairly confident that it will not, for the reasons we have explained *supra* Part V.1. Nevertheless, we need not decide whether Harper's free exercise claim is properly deemed a "hybrid" claim, because, whether or not *Sherbert*'s strict scrutiny test applies, Harper cannot prevail here. "Under the *Sherbert* test, governmental actions that substantially burden a religious practice must be justified by a compelling governmental interest."[38] *Smith*, 494 U.S. at 883. In this case, Harper flunks the test in every respect.

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[36] The district court determined that, "without the free speech claim, plaintiff's free exercise claim does not require strict scrutiny." It then ignored the free speech claim, apparently because it had already found that it was unlikely to succeed. Applying rational basis review, the court concluded that the School's action was rationally based on a legitimate pedagogical concern, and that Harper failed to demonstrate that it was irrational or wholly arbitrary.

[37] We note that the School conceded in essence that the free speech claim was "colorable" for purposes of Harper's establishing "irreparable harm" – one of the factors that may in combination with others justify issuance of a preliminary injunction. *See supra* pp. 10-12. We need not consider, however, whether "colorable" has different meanings for purposes of irreparable harm under *Sammartano*, and for purposes of a hybrid claim under *Miller*, as we assume here that Harper's free speech claim *is* colorable for the latter purpose as well.

[38] We have described the *Sherbert* test as requiring the weighing of three factors: (1) how much the state action interferes with the exercise of religious beliefs; (2) whether there is a compelling state interest justifying a burden on religious beliefs; and (3) whether accommodating

(Continued on following page)

Assuming that *Sherbert* applies, we must first consider whether the School's actions "substantially burden" a religious practice or belief. The record simply does not demonstrate that the School's restriction regarding Harper's T-shirt imposed a substantial burden upon the free exercise of Harper's religious beliefs. There is no evidence that the School "compell[ed] affirmation of a repugnant belief," "penalize[d] or discriminate[d] against [Harper] because [he] hold[s] religious views abhorrent to the authorities," or "condition[ed] the availability of benefits upon [Harper's] willingness to violate a cardinal principle of [his] religious faith." *Sherbert,* 374 U.S. at 402, 406. Nor did the School "lend its power to one or the other side in controversies over religious authority or dogma," or "punish the expression of religious doctrines it believes to be false." *Smith,* 494 U.S. at 877.

Despite Harper's allegation that the School "punished" him for expressing his religious views, the record demonstrates the contrary: the School did not punish Harper at all. It simply prohibited him from wearing the offensive and disruptive shirt and required him to refrain from attending class for a portion of a day, if he insisted on continuing to wear it. Nor did the restriction imposed on Harper's wearing of the T-shirt constitute a substantial limitation on his right to express his religious views. No one has the right to proclaim his views at all times in all manners in all places, regardless of the circumstances, and Harper does not contend that his religion suggests otherwise. Harper remains free to express his views, whatever

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those beliefs would unduly interfere with the fulfillment of the government interest. *N.L.R.B. v. Hanna Boys Center,* 940 F.2d 1295, 1305 (9th Cir. 1991).

their merits, on other occasions and in other places. The prohibition against the wearing of a T-shirt in school does not constitute a substantial burden on the exercise of his religious beliefs.

Even if a religious creed, or an individual's interpretation of that creed, could be said to require its adherents to proclaim their religious views at all times and in all places, and to do so in a manner that interferes with the rights of others, the First Amendment would not prohibit the state from banning such disruptive conduct in certain circumstances, including on a high school campus. The Constitution does not authorize one group of persons to force its religious views on others or to compel others to abide by its precepts. Nor does it authorize individuals to engage in conduct, including speech, on the grounds of public schools, that is harmful to other students seeking to obtain a fair and equal education – even if those individuals hold a sincere belief that the principles of their religion require them to discriminate against others, or to publicly proclaim their discriminatory views whenever they believe that "evil" practices are being condoned. *See Sherbert,* 374 U.S. at 403 (internal quotation marks omitted) ("[E]ven when the action is in accord with one's religious convictions, it is not totally free from legislative restrictions."). Schools may prohibit students and others from disrupting the educational process or causing physical or psychological injury to young people entrusted to their care, whatever the motivations or beliefs of those engaged in such conduct. Indeed, the state's interest in doing so is compelling.

Because there is no evidence that the School's restriction on Harper's wearing of his T-shirt substantially burdened a religious practice or belief, and because the

School has a compelling interest in providing a proper educational environment for its students and because its actions were narrowly tailored to achieve that end,[39] it would appear that the district court did not abuse its discretion in finding that Harper failed to demonstrate a likelihood of success on the merits as to his free exercise of religion claim. Before reaching that conclusion, however, we must deal with one final argument that Harper raises as a part of that claim. Harper asserts that the School "attempted to change" his religious views that "homosexuality is harmful to both those who practice it and the community at large." Specifically, Harper alleges that the school officials' comments that his shirt was "inflammatory," Detective Hubbert's questioning of him, and Assistant Principal Giles' statement that he leaves his Christian faith in the car when he comes to school, all were attempts by school authorities to change his religious views.

The district court rejected Harper's contention. Indeed, there is no evidence in the record that the school representatives sought to change Harper's religious beliefs. Harper's complaint avers that Detective Hubbert "proposed to [Harper] that as a member of the Christian faith, he should understand that Christianity was based on love not hate, and that [he] should not be offensive to others." Hubbert's homily did not constitute an attempt to change Harper's religious views, simply his offensive

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[39] As discussed earlier, the School did no more than necessary to further its compelling interest in protecting the rights of students and maintaining a healthy learning environment. It merely prohibited Harper from wearing the T-shirt at school, and did not even take the additional step of suspending or otherwise punishing him.

behavior; at most, it was, as the district court concluded, an "option[] presented to and left with" Harper. The statements that the message on Harper's shirt was "inflammatory" and would be harmful to the educational environment were merely statements of fact that represented the School's informed judgment. More important, like Hubbert's statement, they were designed to affect Harper's behavior not his beliefs. As for Giles' comments, his affidavit stated that he did not tell Harper to "leave his own faith in the car," but explained that, as a school employee, he, Giles, had to leave *his own* Christian faith in the car when he came to work. While Giles' statement might also be construed as an attempt to encourage Harper to change his conduct – to refrain, while on campus, from expressing religious views that denigrate others – it cannot be characterized as an attempt to change his views. In fact, rather than tell Harper to change his beliefs, Giles encouraged him to join the campus Bible Club so that he could become part of an "activity that would express his [Christian] opinions in a positive way on campus," an activity that was wholly consistent with Harper's religious views. The record thus does not support Harper's claim that the School violated his free exercise right by "attempting to change" his religious views.

Moreover, school officials' statements and any other school activity intended to teach Harper the virtues of tolerance constitute a proper exercise of a school's educational function, even if the message conflicts with the views of a particular religion. A public school's teaching of secular democratic values does not constitute an unconstitutional attempt to influence students' religious beliefs. Rather, it simply reflects the public school's performance of its duty to educate children regarding appropriate secular

subjects in an appropriate secular manner. As we have reiterated earlier, "the inculcation of fundamental values necessary to the maintenance of a democratic political system" is "truly the 'work of the schools.'" *Fraser,* 478 U.S. at 681, 683 (quoting *Ambach v. Norwick,* 441 U.S. 68, 76-77 (1979); quoting *Tinker,* 393 U.S. at 508). Public schools are not limited to teaching materials that are consistent with all aspects of the views of all religions. So long as the subject and materials are appropriate from an educational standpoint and the purpose of the instruction is secular, the school's teaching is not subject to a constitutional objection that it conflicts with a view held by members of a particular religion. There is no evidence here that the school officials' comments were associated with a religious, as opposed to a secular, purpose. Their affidavits demonstrate that the School acted in order to maintain a secure and healthy learning environment for all its students, not to advance religion.

The Constitution does not preclude school districts from teaching the essential elements of democracy or otherwise performing their proper educational mission simply because some individuals or groups may assert that their religious views are inconsistent with the lessons taught as a part of that mission. Accordingly, we affirm the district court's decision that Harper was not entitled to a preliminary injunction on the basis of his free exercise claim.

3. Establishment Clause Claim

Finally, we consider the district court's conclusion that Harper did not demonstrate a likelihood of success on the merits of his claim that the School violated the

Establishment Clause by attempting to "coerce" him into changing his religious beliefs that "homosexuality is harmful to both those who practice it and the community at large."

Harper's Establishment Clause claim as presented on appeal appears to be simply a restatement of his Free Exercise claim. In fact, as the Supreme Court has noted, its Establishment Clause cases "for the most part have addressed governmental efforts to *benefit* religion or particular religions," and thus allegations of an "attempt to *disfavor*" a religion, such as Harper's, are properly analyzed under the Free Exercise Clause. *Lukumi,* 508 U.S. at 532 (emphasis added). However, in the interest of thoroughness, we briefly address Harper's claim of "coercion" under the Establishment Clause.

Harper bases his claim almost entirely on the Supreme Court's statement in *Lee v. Weisman*, that "at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which 'establishes a [state] religion or religious faith, or tends to do so.'"[40] 505 U.S. 577, 587 (1992) (quoting *Lynch v. Donnelly,* 465 U.S. 668, 678 (1984)). Here, there is no evidence that the School's actions were based on anything other than an entirely secular and legitimate aim of protecting the rights

[40] The only other case upon which Harper relies for his coercion claim is *Peloza v. Capistrano Unified Sch. Dist.*, in which this court observed that "[t]o permit [a teacher] to discuss his religious beliefs with students during school time on school grounds would violate the Establishment Clause." 37 F.3d 517, 522 (9th Cir. 1994). Like *Lee*, the case is inapposite as it involves the entirely different issue of school-sanctioned religious speech which "would have the primary effect of advancing religion, and would entangle the school with religion." *Id.*

of students and promoting a tolerant and safe learning environment. There is certainly no evidence (or even allegation) that school authorities sought to coerce or encourage Harper to participate in some other religion or to adopt some state-supported or other religious faith. To reiterate what we explained in the "Free Exercise" section of this opinion, the teaching of secular democratic values does not violate the First Amendment, even if that teaching conflicts in some respect with a sincerely held view that a student or his parents may attribute to the particular religion to which they adhere.

Government conduct does not violate the Establishment Clause when (1) it has a secular purpose, (2) its principal and primary effect neither advances nor inhibits religion, and (3) it does not foster excessive government entanglement in religion. *See Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). For the reasons we have already explained, the record supports the district court's conclusion that the School's actions "had a secular purpose, *i.e.*, promoting tolerance, and not advancing or inhibiting religion." It is also clear from the record that the primary effect of the School's banning of the T-shirt was not to advance or inhibit religion but to protect and preserve the educational environment and the rights of other members of the student body. Nor can there be any question in this case of excessive government entanglement in religion. Finally, as we have already discussed, there is no evidence in the record that school officials attempted to change Harper's religious beliefs. A fortiori, there is no evidence that they attempted to *coerce* Harper into changing his beliefs. For all the above reasons, we hold that the district court did not abuse its discretion in finding that Harper

failed to demonstrate a likelihood of success on the merits of his Establishment Clause claim.

4. Other Claims

In addition to the denial of his preliminary injunction motion, Harper asks that we review the district court's dismissal of his due process and equal protection causes of action, as well as the court's grant of qualified immunity to the individual defendants, under the doctrine of "pendent appellate jurisdiction." We may exercise pendent appellate jurisdiction "over rulings that are inextricably intertwined with or necessary to ensure meaningful review of decisions that are properly before us on interlocutory appeal." *Poulos v. Caesars World, Inc.*, 379 F.3d 654, 668 (9th Cir. 2004) (internal quotation marks omitted). In order for pendent issues to be "inextricably intertwined" they must either "'(a) be so intertwined that we must decide the pendent issue in order to review the claims properly raised on interlocutory appeal . . . or (b) resolution of the issue properly raised on interlocutory appeal necessarily resolves the pendent issue.'" *Batzel v. Smith*, 333 F.3d 1018, 1023 (9th Cir. 2003) (quoting *Cunningham v. Gates*, 229 F.3d 1271, 1285 (9th Cir. 2000)).

With regard to Harper's due process cause of action, it is based on his claim that the School's dress code is impermissibly vague in violation of the Due Process Clause. As we have already explained, *see supra* note 11, we need not consider the validity of the School's dress code in order to rule on the preliminary injunction. As to Harper's equal protection contention, as presented on this appeal it is simply a restatement of his viewpoint discrimination claim which, for the reasons already provided,

we have rejected. Whether or not there may be other aspects to the claim we do not know with certainty at this point in the proceedings; thus we do not review that claim here. Accordingly, neither the due process nor equal protection claim is one we must decide in order to resolve the issue before us, and our resolution of the issue before us does not require us to determine the merits of either claim. Whatever the merits of those claims (and we have no cause here to question the district court's decision as to either), their validity or invalidity is of no consequence here. Finally, the district court's dismissal of Harper's damages claims based on a finding of qualified immunity is not "inextricably intertwined" with the denial of the preliminary injunction motion, *Poulos,* 379 F.3d at 668, as we need not "decide the [qualified immunity] issue in order to review the claims properly raised on interlocutory appeal. . . . " *Batzel,* 333 F.3d at 1023 (quoting *Cunningham v. Gates,* 229 F.3d 1271, 1284 (9th Cir. 2000)).

VI. Conclusion

We hold that the district court did not abuse its discretion in denying the preliminary injunction. Harper failed to demonstrate that he will likely prevail on the merits of his free speech, free exercise of religion, or establishment of religion claims. In fact, such future success on Harper's part is highly unlikely, given the legal principles discussed in this opinion. The Free Speech Clause permits public schools to restrict student speech that intrudes upon the rights of other students. Injurious speech that may be so limited is not immune from regulation simply because it reflects the speaker's religious views. Accordingly, we affirm the district court's denial of Harper's motion for a preliminary injunction.

AFFIRMED; REMANDED for further proceedings consistent with this opinion.

Exhibit A

KOZINSKI, Circuit Judge, dissenting:

While I find this a difficult and troubling case, I can agree with neither the majority's rationale nor its conclusion. On the record to date, the school authorities have offered no lawful justification for banning Harper's t-shirt and the district court should therefore have enjoined them from doing so pending the outcome of this case. Harper, moreover, raised a valid facial challenge to the school's harassment policy, and the district court should have enjoined the policy as well.

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The T-shirt

As the majority correctly notes, school speech falls into three categories, each governed by its own standard. The first category involves school-sponsored speech, which is governed by *Hazelwood School District v. Kuhlmeier,* 484 U.S. 260, 270-71 (1988). The second involves vulgar or plainly offensive speech, and it is governed by *Bethel School District No. 403 v. Fraser,* 478 U.S. 675, 683-85 (1986). All other speech falls into the third category and is governed by *Tinker v. Des Moines Independent Community School District,* 393 U.S. 503, 511-14 (1969).

Harper's t-shirt was clearly not school sponsored, so the *Hazelwood* standard – highly deferential to school authorities – does not apply. Until recently, it was a closer question whether Harper's t-shirt involved plainly offensive speech, which may be banned by the school under *Fraser. See Scott v. School Bd. of Alachua County,* 324 F.3d 1246, 1249 (11th Cir. 2003) (per curiam) (upholding ban on Confederate flag under both *Tinker* and *Fraser*). But our recent opinion in *Frederick v. Morse,* 439 F.3d 1114 (9th Cir. 2006), puts this issue to rest, explaining that "plainly offensive" under *Fraser* is determined by the language used, not the idea conveyed. *See id.* at 1119-21. Since there was nothing offensive about the *language* of Harper's t-shirt, the school authorities here cannot rely on *Fraser.*[1]

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[1] Reconciling *Tinker* and *Fraser* is no easy task. The Supreme Court majority in *Fraser* seems to have been influenced by the indecorousness of Fraser's comments, which referred to a fellow student in terms that could be understood as a thinly-veiled phallic metaphor. *See Fraser,* 478 U.S. at 687 (Brennan, J., concurring) (quoting Fraser's comments). The curious thing, though, is that Fraser used no dirty *words,* so his speech could only have been offensive on account of the

(Continued on following page)

If the school's ban of the shirt is to be upheld, then, it must be because it "materially disrupts classwork or involves substantial disorder or invasion of the rights of others." *Tinker,* 393 U.S. at 513.

1. School authorities may ban student speech based on the existence of "any facts which might reasonably [lead] school authorities to forecast substantial disruption." *Id.* at 514. While we do not require school officials to be certain that disruption will occur, *see LaVine v. Blaine Sch. Dist.,* 257 F.3d 981, 989 (9th Cir. 2001), they must present "evidence that [the ban] is necessary to avoid *material* and *substantial* interference with schoolwork or discipline." *Tinker,* 393 U.S. at 511 (emphasis added).

The school authorities here have shown precious little to support an inference that Harper's t-shirt would "materially disrupt[] classwork." One teacher, David LeMaster,

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ideas he conveyed – the ideas embodied in his elaborate double-entendre. So construed, however, *Fraser* swallows up *Tinker,* by suggesting that some ideas can be excluded from the high school environment, even if they don't meet the *Tinker* standard.

Fraser might also be read as dealing with the situation involving a captive audience because the speech was given at a school sponsored assembly. However, attendance at the assembly was merely expected, not required, so students were perfectly free not to listen to the offensive speech. *See Fraser,* 478 U.S. at 677. Then, again, how were students to know that they would hear a sexually offensive speech when they attended an assembly designed to debate the merits of candidates for student political office? Perhaps *Fraser* is best read as dealing with the situation where the school sponsors the activity in question and invites or encourages students to attend. By giving its imprimatur to the activity, the school is, in effect, assuring potential attendees that they will not be subjected to anything plainly offensive. So read, *Fraser* is merely a precursor to *Hazelwood,* and has no application at all to speech that has no school sponsorship at all – like talk in the corridors or messages on t-shirts worn by students.

said that several students in class were "off-task talking about [the] content of 'Chase's shirt' when they should have been working." LeMaster decl. at 2. Surely, however, it is not unusual in a high school classroom for students to be "off-task." The scène à faire of high school students bored or distracted in class is a cliché.[2] LeMaster gives no indication that the distracted students refused to get back on task once they were admonished, or that the t-shirt caused a commotion or otherwise materially interfered with class activities. As this is the *only* evidence that Harper's t-shirt interfered with classroom learning, I find it ludicrously weak support for banning Harper's t-shirt on the ground that it would "materially disrupt[] classwork." *Tinker,* 393 U.S. at 513.

The remaining two pieces of evidence presented by the defendants do not involve disruption of classwork, and thus must be judged by the "substantial disorder" standard. *Id.* School authorities have far less latitude to ban speech that does not interfere with learning situations. Between classes, students are free – indeed encouraged – to engage in discussions that are not strictly school related. Politics, sports, movies, music and personal matters are the ordinary subjects of discourse in high school corridors and lunch rooms.[3] Occasionally such discussions

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[2] *See, e.g., Ferris Bueller's Day Off* (Paramount Pictures 1986); J.K. Rowling, *Harry Potter and the Half-Blood Prince* (2005); *Buffy the Vampire Slayer; Beverly Hills 90210; The O.C.; Saved by the Bell; Veronica Mars;* and zillions more.

[3] This theme too has been mined by screenwriters ad nauseam. *See, e.g., The Breakfast Club* (Universal Pictures 1985); *Clueless* (Paramount Pictures 1995); *10 Things I Hate About You* (Touchstone Pictures 1999); *Mean Girls* (Paramount Pictures 2004); *Saved!* (United Artists Pictures 2004).

can become heated, but so long as they don't escalate into violence or the threat of violence, and do not otherwise interfere with school operations, they cause no disruption of the school environment.

Defendants point to Harper's own report that "he [had been] involved in a tense verbal conversation with a group of students" earlier that day, but this is hardly the stuff of which substantial disorder is made. Fisher decl. at 3. People – judges even – often have strong views and their discussions will naturally reflect this intensity of feeling. There is nothing at all wrong with that, and it normally does not lead to substantial disorder. There is no indication that Harper's discussion turned violent or disrupted school activities. There is no evidence that it involved shouting or threats, or that it interfered with the passage of students to and from class. The discussion, tense though it may have been, did not have to be broken up by school authorities; rather, it seems to have come to a peaceful conclusion. The best proof that this "tense verbal conversation" did not cause substantial disorder is that the school authorities knew nothing about the incident until Harper himself reported it. The only thing one can infer from this evidence is that, whatever strong feelings Harper's t-shirt may have aroused, it did *not* cause any disruption of school activities, substantial or otherwise.

The second piece of evidence on which the school authorities rely doesn't involve Harper at all. It consists of surprisingly vague references to some incidents that had occurred a year earlier, "during the days surrounding the Day of Silence between certain gay and straight students." Fisher decl. at 3. Poway High School Principal Scott E. Fisher describes the situation as follows: "For example, an altercation had occurred which required me to physically

separate the students. Those students were disciplined for their actions." *Id.* Assistant Principal Lynell Antrim has the following description:

> The previous year, in April, 2003, the Day [of Silence] brought some volatile behavior between students, and there was an unsanctioned Straight-Pride Day a week or so later. No club organized that Straight-Pride Day, but there were store-printed shirts with inflammatory messages and some hand-scripted T-shirts with derogatory remarks. Some students last year were asked to remove the shirts and did so. Other students had an altercation and were suspended for their actions.

Antrim decl. at 2. Finally, Assistant Principal Edward L. Giles explains as follows:

> I told Ron Harper [Chase's dad] of our concern for the safety of our students when they altered their clothes to carry messages that could be inflammatory or demeaning. I told him we had some situations in the past of physical altercations because someone took exception to a message concerning sexual orientation on another person. I explained to him we did not want messages that carried with them a negative tone.

Giles decl. at 4.

Evidence that derogatory messages on t-shirts had resulted in physical altercations between students in the past certainly could be relevant in determining whether Harper's message would be likely to cause such disruption in the future. Unfortunately, however, it is not clear from these declarations that the messages on the t-shirts were in any way involved in the previous year's altercation;

Antrim's declaration seems to say that the students involved in the altercation were *different* from the students who wore the t-shirts. Only Giles suggests a connection between the t-shirts and the altercations, and then somewhat obliquely.[4] More importantly, we are not told how closely the messages in the previous year mirrored that on Harper's t-shirt. For all we know, the previous year's t-shirts contained invective, profanity or epithets; they may have called for violence against homosexuals. Nor do we know whether the altercations in question were caused by the t-shirts alone, or by a combination of the t-shirts and oral taunts by those wearing the shirts or by those who opposed them. In short, without knowing a great deal more about the situation in the previous year – information the school authorities surely had available and could have put into the record – I cannot say that defendants reasonably concluded that Harper's wearing of *this* t-shirt was likely to cause substantial disruption.[5]

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[4] Giles, it will be noted, is swearing only that this is what he told Ron Harper; he is not swearing this is, in fact, what had happened the previous year. It's possible that Giles's statement to Harper was exaggerated or tailored to help defuse the situation. As Giles was not then under oath, a little stretching of the truth to jolly along an angry parent might have been perfectly okay. However, when this statement is imported into the litigation as hearsay, I'm not sure we are bound to believe anything more than this is what Giles told Harper.

[5] I must also mention the incongruity of prohibiting speech because others respond to it with violence. Assuming that someone in the previous year wore a t-shirt similar to Harper's, and was physically attacked "because someone took exception to a message concerning sexual orientation," Giles decl. at 4, I'm not prepared to say that this alone would be sufficient to ban the shirt. Maybe the right response is to expel students who attack other students on school premises. *But see Karp v. Becken*, 477 F.2d 171, 173, 175-76 (9th Cir. 1973) (upholding confiscation of protest banners based on a variety of factors, including threats of violence by other students).

There is, in fact, persuasive evidence that it would not. I have already mentioned the apparently peaceful confrontation Harper had with other students that very day; while words were exchanged, the students managed the situation well and without intervention from the school authorities. No doubt, everyone learned an important civics lesson about dealing with others who hold sharply divergent views. Moreover, Harper wore a t-shirt with substantially the same message the entire previous day, yet there was no disruption. *See* maj. op. at 4-5. While I agree that school officials need not wait for students to come to blows, their determination of likely disruption must be reasonable. On this record, I cannot find that it was.

But there is a more fundamental issue here. The record reveals quite clearly that Harper's t-shirt was not an out-of-the-blue affront to fellow students who were minding their own business. Rather, Harper wore his t-shirt in response to the Day of Silence, a political activity that was sponsored or at the very least tolerated by school authorities.[6] The Day of Silence is a protest sponsored by the Gay, Lesbian and Straight Education Network (GLSEN). According to a GLSEN press release, the Day of Silence is "an annual, national student-led effort in which

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[6] Assistant Principal Antrim in her declaration refers to the Straight-Pride Day the previous year as "unsanctioned," suggesting a contrast with the Day of Silence. The school authorities have a close working relationship with the Gay-Straight Alliance (GSA), the campus club that sponsors the Day of Silence. After last year's "tension" over the Day of Silence, the principal and the associated student body director worked with the GSA throughout the year to set "clearer guidelines" for this year's Day of Silence, and to "problem solve" tension among students about these issues. Antrim decl. at 2.

participants take a vow of silence to peacefully protest the discrimination and harassment faced by lesbian, gay, bisexual and transgender (LGBT) youth in schools." Press Release, GLSEN, *A New Record for the Day of Silence* (Apr. 14, 2004), *available at* http://www.glsen.org/cgi-bin/iowa/all/news/record/1655.html. The point of this protest, as I understand it, is to promote tolerance toward all students, regardless of their sexual orientation. *See* Antrim decl. at 2.

Tolerance is a civic virtue,[7] but not one practiced by all members of our society toward all others. This may be unfortunate, but it is a reality we must accept in a pluralistic society.[8] Specifically, tolerance toward homosexuality and homosexual conduct is anathema to those who believe that intimate relations among people of the same sex are

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[7] The majority waxes eloquent about the right of schools "to teach civic responsibility and tolerance as part of its basic educational mission," while suppressing other points of view. Maj. op. at 38. But one man's civic responsibility is another man's thought control. For example, respect for the Constitution and support for the military are commonly regarded as civic virtues. But laws requiring schools receiving federal funding to hold a Constitution Day or to give military recruiters the names, addresses and phone numbers of their students have proved quite controversial. *See* Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, § 111(b), 118 Stat. 2809, 3344 (2004); 20 U.S.C. § 7908; *see also Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 126 S. Ct. 1297 (2006). Having public schools, and those who fund them, define civic responsibility and then ban opposing points of view, as the majority seems willing to do, may be an invitation to group-think.

[8] Indeed, tolerance may not always be a virtue. Tolerating wicked conduct, bigotry or malicious gossip, for example, may not be in the least commendable. Then there is the question of whether we should tolerate intolerance, a question as imponderable as a Möbius strip. Whether tolerance is a good or a bad thing may turn on what we think about the thing being tolerated.

immoral or sinful. So long as the subject is kept out of the school environment, these differences of opinion need not clash. But a visible and highly publicized political action by those on one side of the issue will provoke those on the other side to express a different point of view, if only to avoid the implication that they agree. *See* Robert Bolt, *A Man for All Seasons* act 2, at 88 (1962) ("The maxim of the law is 'Silence gives consent.'").

Given the history of violent confrontation between those who support the Day of Silence and those who oppose it, the school authorities may have been justified in banning the subject altogether by denying both sides permission to express their views during the school day. *See, e.g., West v. Derby Unified Sch. Dist. No. 260,* 206 F.3d 1358, 1361, 1366 (10th Cir. 2000) (upholding ban on items that give rise to racial tension such as Confederate flags and Malcolm X t-shirts). I find it far more problematic – and more than a little ironic – to try to solve the problem of violent confrontations by gagging only those who oppose the Day of Silence and the point of view it represents. Or, as Judge Rosen put it in *Hansen v. Ann Arbor Public Schools,* 293 F. Supp. 2d 780 (E.D. Mich. 2003), "[t]hat Defendants can say with apparent sincerity that they were advancing the goal of promoting 'acceptance and tolerance for minority points of view' by their demonstrated *in* tolerance for a viewpoint that was not consistent with their own is hardly worthy of serious comment." *Id.* at 801-02.

I cannot imagine that my colleagues would approve this in other situations. Say, for example, one school group – perhaps the Young Republicans – were to organize a day of support for the war in Iraq by encouraging students to wear a yellow armband. And suppose that other students

responded by wearing t-shirts with messages such as "Marines are Murderers" and "U.S. Bombs Kill Babies." If a student whose brother was killed in Iraq assaulted a student wearing one of the anti-war t-shirts, would we approve a school's response that banned the t-shirts but continued to permit the yellow armbands? *See R.A.V. v. City of Saint Paul*, 505 U.S. 377, 392 (1992) ("[The government] has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules."). Not to worry, says the majority, because students can still sport t-shirts that criticize "the President, his administration, or his policies, or otherwise invite political disagreement or debate." Maj. op. at 30. But acceptance of homosexuality *is* a political disagreement and debate. It's not at all clear to me how one can criticize public officers and their policies without also addressing the controversial policies they adopt. For example, in 2004, San Francisco mayor Gavin Newsom issued marriage licenses to nearly 4,000 gay and lesbian couples. While some people view this as a courageous and principled action, others consider it an abomination. It's not at all clear to me how those in the latter camp could go about expressing their vehement disagreement with Mayor Newsom's policy without also expressing disdain for those who turned out at City Hall to take advantage of the policy.

Of the possible measures a school might take to deal with substantial disruption of the school environment, those involving viewpoint discrimination would seem to me to be the least justifiable. To quote Judge Rosen once again, "no matter how well-intentioned the stated objective, once schools get into the business of actively promoting one political or religious viewpoint over another, there

is no end to the mischief that can be done in the name of good intentions." *Hansen,* 293 F.Supp.2d at 803.

2. *Tinker* does contain an additional ground for banning student speech, namely where it is an "invasion of the rights of others." 393 U.S. at 513. The school authorities suggest that Harper's t-shirt violates California Education Code § 201(a), which provides that "[a]ll pupils have the right to participate fully in the educational process, free from discrimination and harassment." Defendants cite no California case holding that the passive display by one student of a message another student finds offensive violates this provision, and I am reluctant to so conclude on my own. The interaction between harassment law and the First Amendment is a difficult and unsettled one because much of what harassment law seeks to prohibit, the First Amendment seems to protect. *See Saxe v. State Coll. Area Sch. Dist.,* 240 F.3d 200, 206-10 & n.6 (3d Cir. 2001). Certainly, state law cannot trump the First Amendment by defining "harassment" as any conduct that another person finds offensive; far too much core First Amendment speech could thus be squelched. *See* Eugene Volokh, Comment, *Freedom of Speech and Workplace Harassment,* 39 UCLA L. Rev. 1791 (1992), *available at* http://www1.law.ucla.edu/%25volokh/harass/substanc.htm in updated form.

Harassment law might be reconcilable with the First Amendment, if it is limited to situations where the speech is so severe and pervasive as to be tantamount to conduct. *See Saxe,* 240 F.3d at 204-10. I need not consider whether section 201(a) is susceptible to such a narrowing construction because it is quite clear that Harper's lone message was not sufficiently severe and pervasive to meet the standard articulated in *Faragher v. City of Boca Raton,*

524 U.S. 775, 788 (1998). Rather, it seems more like the "simple acts of teasing and name-calling," described by the Supreme Court as non-actionable in *Davis v. Monroe County Board of Education*, 526 U.S. 629, 652 (1999). The "rights of others" language in *Tinker* can only refer to traditional rights, such as those against assault, defamation, invasion of privacy, extortion and blackmail, whose interplay with the First Amendment is well established. Surely, this language is not meant to give state legislatures the power to define the First Amendment rights of students out of existence by giving others the right not to hear that speech.[9] Otherwise, a state legislature could effectively overrule *Tinker* by granting students an affirmative right not to be offended. To the extent that state law purports to prohibit such language in the school context, it is patently unconstitutional.

Nor can I join my colleagues in concluding that Harper's t-shirt violated the rights of other students by disparaging their homosexual status. As I understand the opinion, my colleagues are saying that messages such as Harper's are so offensive and demeaning that they interfere with the ability of homosexual students to partake of the educational environment. This is not a position briefed or argued by any of the parties, and no one introduced any

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[9] It is clear, moreover, that the California legislature did not intend to make inroads into the speech rights of students, since California Education Code § 48950(a) gives students *greater* speech rights than they have under federal law. While Harper waived reliance on this section as an independent source of authority for his appeal, *see* maj. op. at 1176 n.13, we can certainly consider it in deciding how to construe other provisions of California law. Given the broad sweep of section 48950(a), it is simply not tenable to claim, as the majority seems to, that California Education Code sections 200 and 201 limit student speech under the "rights of others" prong of *Tinker*.

evidence in support of, or opposition to, this proposition. The school authorities did not try to justify their actions on this ground; instead, they argued that they can ban any t-shirt derogatory to another individual, a proposition that the majority rejects. *See* maj. op. at 30

Such sua sponte lawmaking raises many problems, the first of which is that it finds no support in the record. What my colleagues say could be true, but the only support they provide are a few law review articles, a couple of press releases by advocacy groups and some pop psychology. Aside from the fact that published articles are hardly an adequate substitute for record evidence, the cited materials are just not specific enough to be particularly helpful. None would seem to meet the standard of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 592-94 (1993).

The first article, written by physicians but apparently not peer-reviewed, makes a general statement to the effect that academic under-achievement and other problems of homosexual youths "are the probable consequence of violence and verbal and physical abuse at school." Susanne M. Stronski Huwiler & Gary Remafedi, *Adolescent Homosexuality*, 33 Rev. Jur. U.I.P.R. 151, 164 (1999). The article does not explain what the authors mean by "verbal . . . abuse," so it's not clear that Harper's t-shirt is even covered by the article's findings. Nor does the article explain the degree to which statements, as opposed to physical abuse, are responsible for the ill effects it discusses. The second article, written by a lawyer, not a health-care professional, merely points to general problems suffered by gay and lesbian youths during their school years – problems that are reinforced by a variety of school practices and policies. *See* Thomas A. Mayes,

Confronting Same-Sex, Student-to-Student Sexual Harassment: Recommendations for Educators and Policy Makers, 29 Fordham Urb. L.J. 641, 655-58 (2001). The other articles the majority cites also focus on physical abuse or threats, which the school can and should stamp out in a viewpoint neutral way. *See* Amy Lovell, *"Other Students Always Used to Say, 'Look At The Dykes'": Protecting Students From Peer Sexual Orientation Harassment,* 86 Cal. L. Rev. 617, 625-28 (1998); Courtney Weiner, Note, *Sex Education: Recognizing Anti-Gay Harassment as Sex Discrimination Under Title VII and Title IX,* 37 Colum. Hum. Rts. L. Rev. 189, 221-25 (2005); Kelli Kristine Armstrong, *The Silent Minority Within a Minority: Focusing on the Needs of Gay Youth in Our Public Schools,* 24 Golden Gate U.L. Rev. 67, 76-77 (1994). The majority finally resorts to press releases from advocacy groups – hardly a source "whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). What the materials the majority cites do establish is that the success of gay and lesbian teens in school is a complicated phenomenon, influenced by many factors. Even taking the sources on their own terms, none provides support for the notion that disparaging statements by other students, in the context of a political debate, materially interfere with the ability of homosexual students to profit from the school environment.

Nor do I find the proposition at the heart of the majority's opinion – that homosexual students are severely harmed by any and all statements casting aspersions on their sexual orientation – so self-evident as to require no evidentiary support. We take judicial notice of facts that aren't reasonably subject to dispute – gravity, the temperature at which ice melts, that commercial goods cost

money, that time flows forward but not backward. But the fact that we can take judicial notice of certain indisputable facts does not mean that *all* facts are indisputable. Predicting the effect of certain kinds of statements on the learning ability of high school students is simply not the kind of "fact" that is judicially noticeable under any fair reading of Federal Rule of Evidence 201. Even the articles that the majority cites admit that the research on these effects is not unanimous. *See, e.g.,* Lovell, 86 Cal. L. Rev. at 623-24. We have no business assuming without proof that the educational progress of homosexual students would be stunted by Harper's statement.

I find it significant, moreover, that Harper did not thrust his view of homosexuality into the school environment as part of a campaign to demean or embarrass other students. Rather, he was responding to public statements made by others with whom he disagreed. Whatever one might think are the psychological effects of unprovoked demeaning statements by one student against another, the effects may be quite different when they are part of a political give-and-take. By participating in the Day of Silence activities, homosexual students perforce acknowledge that their status is not universally admired or accepted; the whole point of the Day of Silence, as I understand it, is to dispute views like those characterized by Harper's t-shirt. Supporters of the Day of Silence may prefer to see views such as Harper's channeled into public discourse rather than officially suppressed but whispered behind backs or scribbled on bathroom walls. Confronting – and refuting – such views in a public forum may well empower homosexual students, contributing to their sense of self-esteem.

Beyond the question of evidentiary support, I have considerable difficulty understanding the source and sweep of the novel doctrine the majority announces today.[10] Not all statements that demean other students can be banned by schools; the majority is very clear about this. *See* maj. op. at 29-30 & n.27. The new doctrine applies only to statements that demean students based on their "minority status such as race, religion, and sexual orientation." *Id.* at 31-32.[11] Is this a right created by state law? By

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[10] The majority makes a tepid effort to rely on cases from other circuits, but those cases provide virtually no support. *West* did not purport to announce a generalized right to be left alone that includes the right not to hear viewpoints one finds uncomfortable. *See West,* 206 F.3d at 1366. The school board in *West* confronted a long history of racial strife and banned certain political symbols on *both* sides of the controversy. *See id.* at 1361-63. *West* was not a case about psychic damage but about physical security, and whatever stray comments the majority today has plucked out of *West* are more in the nature of loose language than a holding, or even dicta.

Sypniewski v. Warren Hills Regional Board of Education, 307 F.3d 243 (3d Cir. 2002), on which the majority also relies, involved a school district with a history of racial strife. Even there, the court upheld the policy prohibiting racial "abuse and intimidat[ion]" only insofar as it amounted to bullying. *Id.* at 264. It emphasized, however, that mere name-calling is protected, and found the policy overbroad insofar as the statements in question merely generated ill will against a student on account of race: "But by itself, an idea's generating ill will is not a sufficient basis for suppressing its expression. 'The mere fact that expressive activity causes hurt feelings, offense, or resentment does not render the expression unprotected.' " *Id.* at 264-65 (quoting *R.A.V.,* 505 U.S. at 414). Finally, *Saxe,* which the majority dismisses in a brief footnote, *see* maj. op. at 24 n.21, cuts entirely the other way, for reasons I explain elsewhere, *see* pp. 30-33 *infra.*

[11] The majority equivocates a bit on this point. At one place it states that "[p]ublic school students who may be injured by verbal assaults on the basis of a core identifying characteristic such as race, religion, or sexual orientation, have a right to be free from such attacks while on school campuses." *Id.* at 20. Read broadly, this would protect students from being disparaged based on any characteristic that two of

(Continued on following page)

federal law? By common law? And if interference with the learning process is the keystone to the new right, how come it's limited to those characteristics that are associated with minority status? Students may well have their self-esteem bruised by being demeaned for being white or Christian, or having bad acne or weight problems, or being poor or stupid or any one of the infinite number of characteristics that will not qualify them for minority status. Under the rule the majority announces today, schools would be able to ban t-shirts with pictures of Mohammed wearing a bomb turban but not those with pictures of a Crucifix dipped in urine – yet Muslim and Christian children, respectively, may have their learning equally disrupted.

Even the concept of minority status is not free from doubt. In defining what is a minority – and hence protected – do we look to the national community, the state, the locality or the school? In a school that has 60 percent black students and 40 percent white students, will the school be able to ban t-shirts with anti-black racist messages but not those with anti-white racist messages, or vice versa? Must a Salt Lake City high school prohibit or permit *Big Love* t-shirts?

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my colleagues consider to be "core." Presumably this could include race, nationality, sex, weight class, hair color and religion – but not political affiliation. *See id.* at 30. Next, the majority notes that "schools may prohibit the wearing of T-shirts on high school campuses and in high school classes that flaunt demeaning slogans, phrases or aphorisms relating to a core characteristic of *particularly vulnerable* students and that may cause them significant injury." *Id.* at 29 (emphasis added). Later on, however, the opinion limits the new doctrine to core minority characteristics. *See id.* at 30 n.27. I read the majority's last formulation to be the one it intends, else my colleagues would pretty much have ripped the heart out of *Tinker*.

And at what level of generality do we define a minority group? If the Pope speaks out against gay marriage, can gay students wear to school t-shirts saying "Catholics Are Bigots," or will they be demeaning the core characteristic of a religious minority? And, are Catholics part of a monolithic Christian majority, or a minority sect that has endured centuries of discrimination in America? *See* maj. op. at 27 n.26.

Finally, I have considerable difficulty with giving school authorities the power to decide that only one side of a controversial topic may be discussed in the school environment because the opposing point of view is too extreme or demeaning. As Judge Gilman said in his persuasive dissent in *Boroff v. Van Wert City Board of Education,* 220 F.3d 465 (6th Cir. 2000), "school officials are not free to decide that only one side of a topic is open for discussion because the other side is too repugnant or demoralizing to listen to." *Id.* at 474 (Gilman, J., dissenting) (citing *Tinker,* 393 U.S. at 508). I couldn't have said it better.

The fundamental problem with the majority's approach is that it has no anchor anywhere in the record or in the law. It is entirely a judicial creation, hatched to deal with the situation before us, but likely to cause innumerable problems in the future. Respectfully, I cannot go along.

The Harassment Policy

I believe we must also address Harper's claim that he is entitled to an injunction against the school's harassment policy on grounds of substantial overbreadth. Harper raised this claim in the district court, *see* Memorandum of

Points and Authorities in Support of Plaintiffs' Motion for Preliminary Injunction at 14-16, but the district judge did not decide it in his otherwise thorough opinion. Harper again raises this claim in his brief before us, and the defendants respond in their brief, yet the majority also fails to decide it. The majority suggests in a footnote that it need not consider whether the school's harassment policy is overbroad because it upholds the school's banning of Harper's t-shirt regardless of the policy. Maj. op. at 13 n.11. The policy, however, covers much more than the particular t-shirt Harper wore on the day in question. Given that the majority has effectively upheld the school's banning of that shirt, it becomes even more important for us to rule on whether and how Harper may express his views in the future.[12] To the extent that the harassment

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[12] The majority also seems to say that Harper limited his prayer for relief to the wearing of the shirt, but this is plainly not so. In his motion for a preliminary injunction, Harper moves the district court

> for a preliminary injunction prohibiting Defendants from continuing their violation of the constitutional rights of Plaintiff Tyler Chase Harper. Unless such injunction issues, Chase will continue to suffer irreparable harm to his free speech right to speak out on matters at school in a nondisruptive manner, even if they are perceived by others as "negative" or "derogatory."

In his Memorandum of Points and Authorities in Support of the Motion, Harper expressly challenges the school's Harassment Policy as a whole on overbreadth grounds. *See* Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Preliminary Injunction 14-16.

Finally, the majority declines to address the overbreadth argument on the ground that the district judge didn't believe it was before him. *See* maj. op. at 13 n.11. But if Harper properly presented the issue – and I have no doubt he did – he is entitled to a ruling, even if we have to address the issue in the first instance. Were a district judge's failure to rule on an issue dispositive, district judges could bury a party's claims simply by ignoring them.

policy limits the ways in which Harper may express himself by means *other* than his t-shirt, he is surely entitled to a ruling as to whether the district court erred in failing to enjoin the policy.

1. The school's harassment policy is contained in several documents. One of these is titled "Student Guide to Understanding and Avoiding Harassment" and contains a list of "actions [that] are prohibited for both students and staff." One such prohibited item is "[n]egative comments or behavior based on race, ethnicity, sexual orientation, religion, or gender." Another publication, addressed to parents, titled "Poway Unified School District Policies & Procedures for Parents Concerning Harassment of Students" contains the following admonition: "SPECIFIC HARASSMENT BEHAVIORS THAT ARE NOT TOLERATED IN THE *POWAY UNIFIED SCHOOL DISTRICT* INCLUDE," which is followed by a number of items, among them "[n]egative comments, slurs, or behaviors based on race, ethnicity, sexual orientation, religion, or gender."

A document titled "Poway Unified School District Administrative Procedure," dated July 28, 1997, and subtitled "Hate Behavior," contains the following definition:

> A hate behavior is any act or attempted act to cause physical injury, emotional suffering, or property damage through intimidation, harassment, racial/ethnic slurs and bigoted epithets, vandalism, force or the threat of force, motivated all or in part by hostility to the victim's real or perceived gender, race, ethnicity, religion, sexual orientation, or mental or physical challenges.

The same document contains a heading titled "Examples of Hate Behavior," which is followed by a "list provid[ing] examples of hate behavior to assist identifying where and when it may exist." Among the items listed are the following:

> 2. The presence of symbols or words considered offensive to persons of a specific gender, race, ethnicity, religion, sexual orientation, or the mentally or physically challenged, such as graffiti, slurs, or painted swastikas.
>
> 3. Activities historically associated with threats to persons of a specific gender, race, ethnicity, religion, sexual orientation, or the mentally or physically challenged (e.g., burning crosses, wearing swastikas or white sheets, flying confederate flags, hanging effigies, defacing pink triangles).
>
> . . . .
>
> 6. Victim belief that the incident was motivated by bias against him/her as a member of a specific gender, race, ethnicity, religion, sexual orientation, or mentally or physically challenged group.
>
> 7. Perpetrator explanation/defense of incident involves exalting own gender, race, ethnicity, religion, sexual orientation, or mental or physical status and/or includes statements demeaning victim group.

Finally, the lengthy Poway High School Student Handbook contains detailed regulations as to every aspect of student life. Among the many items listed is a dress code:

> *Dress*: School clothing should be neat, clean, and appropriate for school activities and should follow the standards of common decency. The dress code will be enforced at all school-sponsored activities. Clothing that violates this standard is unacceptable, and the student in violation will be disciplined appropriately.

Examples of unacceptable dress include "[c]lothing and accessories (including backpacks) that promote or portray . . . [v]iolence or hate behavior including derogatory connotations directed toward sexual identity."

Under the heading "Rules of Student Discipline," there is a long list of prohibited acts, including "Sexual harassment" and "Hate behavior/Violence." The list is both preceded and followed with the admonition that:

> A student will be subject to disciplinary action for the designated acts that are related to school activity and attendance and which occur at any time, including but not limited to any of the following:
>
> - The student is on school grounds at a time when school is in session or a school-sponsored activity is in progress
> - The student is going to or coming from school
> - The student is on break or lunch periods whether on or off campus
> - The student is going to, coming from or attending a school-sponsored activity.

Following this list, are a series of definitions, among them the following:

Discrimination: Discrimination is negative or unfair treatment toward an individual based on race, ethnicity, sexual orientation, religion or gender. It is against the rules for students to make nasty remarks that embarrass others or make them feel uncomfortable with actions or remarks that are sexual or racial in nature.

Harassment: Harassment is unwanted and unwelcome behavior from other students or staff members that interferes with another individual's life. When it is sexual in nature, it is "sexual harassment". When it is racial in nature, it is "hate motivated behavior" or sometimes a "hate crime".

Hate Behavior: Negative behaviors that target members of a particular gender, race, ethnicity, religion, sexual orientation, or the mentally or physically challenged will not be tolerated. Such behaviors may include, but are not limited to:

1. Name calling, racial slurs or bigoted epithets.

2. The presence of symbols or words considered offensive to persons of a specific gender, race, ethnicity, religion, sexual orientation or the mentally or physically challenged, such as graffiti, slurs or painted swastikas.

3. Activities historically associated with threats to persons of a specific gender, race, ethnicity, religion, sexual orientation or the mentally or physically challenged (e.g., burning crosses, wearing swastikas or white sheets, flying confederate flags, hanging effigies, defacing pink triangles).

4. The posting or circulation of demeaning jokes or caricatures, based on negative stereotypes of a specific gender, race, ethnicity, nationality, religion, sexual orientation or mental or physical challenges.

5. The defacing, removal, or destruction of posted materials, meeting places, memorials, etc. associated with specific gender, race, ethnic, religious, sexual orientation or mental or physical challenges.

6. Victim belief that the incident was motivated by bias against him/her as a member of a specific gender, racial, ethnic, religious, sexual orientation or mentally or physically challenged group.

7. Perpetrator explanation/defense of incident involves exalting own gender, race, ethnicity, religion, sexual orientation or mental or physical status and/or includes statements demeaning victim group.

8. The presence of organized hate group literature and/or posters or reference to an organized hate group.

While the parties provide little guidance about how to navigate these not entirely consistent documents, the most plausible way is to treat the two bulletins distributed to parents and students respectively as informal guidance intended to give a summary of the purpose and effect of the formal rules. The Administrative Procedure appears to be internal guidance from the school board to school district employees as to the proper way to interpret the

formal rules. It is the Student Handbook – the lengthy and detailed set of regulations applicable to Poway High School – that contains the binding rules, the violation of which may result in discipline. It is to these regulations, then, that we must look in determining the scope of the school's anti-harassment policy; the remaining three documents can serve merely as guidance in interpreting the regulations.

2. The school's harassment policy seems to prohibit any student speech, whether it be in the classroom, elsewhere on campus, in connection with any school activity, going to and returning from school and quite possibly at all other times and places, if it is derogatory, intended to be derogatory or believed to be derogatory of other students based on certain characteristics – race, ethnicity, sexual orientation, religion, sex or disability. The prohibition extends to jokes or caricatures "based on negative stereotypes," wearing of clothing that portrays "derogatory connotations directed toward sexual identity," name-calling, anything that someone who is a member of one of the protected categories believes was directed against him on account of his status, and any statement by the speaker that exalts his own status in comparison to that of others. The Student Guide to Understanding and Avoiding Harassment seems to summarize the policy fairly accurately when it explains that "[n]egative comments or behavior based on race, ethnicity, sexual orientation, religion, or gender" are prohibited. That is pretty much the position taken by Principal Fisher in his declaration: "It is my stance that any shirt which is worn on campus which speaks in a derogatory manner towards an individual or group of individuals is not healthy for young people and in violation of school policy." Fisher decl. at 3.

So interpreted, the school's harassment policy is substantially overbroad, largely for the reasons articulated by the Third Circuit in *Saxe v. State College Area School District,* 240 F.3d 200 (3d Cir. 2001). The policy here, like that in *Saxe,* is not limited to speech that is vulgar, as defined by *Fraser,* or likely to cause substantial disruption under *Tinker.* Also, as in *Saxe,* the policy here is not limited to offensive speech that is severe and pervasive, so that the prohibition might be approved under our emerging harassment law jurisprudence. *See id.* at 217. Rather, the policy prohibits pretty much any speech that any student who is a member of one of the protected groups might take umbrage at.

The policy here is, in fact, much broader than that in *Saxe* in several important respects. First, the policy in *Saxe* seems to have been limited to school premises; the *Saxe* court, at least, treated it as such, noting that if the policy were to cover speech outside of school, it would raise additional constitutional problems. *Id.* at 216 & n.11. By contrast, the policy here expressly applies outside school premises, extending to off-campus school activities and to travel to and from school. Moreover, the policy expressly states that it may apply elsewhere as well. The policy's vast and uncertain geographic sweep makes it even more important that its substantive terms be narrowed down and precisely defined, consistent with the First Amendment.

Second, the policy in *Saxe* was found to be overbroad because it prohibited not merely speech that was actually disruptive, but also speech that had the purpose of disrupting, regardless of whether actual disruption occurred. *Id.* at 216. The policy here says relatively little about disruption, whether intended or actual. Rather, it

prohibits much speech merely because of its "derogatory connotations" or because it "interferes with another individual's life." Assuming that a person of ordinary intelligence could even understand what these vacuous phrases mean, the policy here covers vastly more territory than permissible under *Tinker*.

Third, the policy in *Saxe* at least attempted to apply some sort of objective definition of what might be deemed offensive or intimidating. *Id.* at 215 ("[H]arassment under the Policy 'can include any unwelcome verbal, written or physical conduct which offends, denigrates or belittles an individual because of any of the characteristics described above.'"). By contrast, the policy here focuses expressly on what the individual who believes himself to be the target of the speech believes was the motivation of the speaker. Given the propensity of individuals, particularly adolescents, to view themselves as the center of the universe, this strikes me as a particularly broad and chilling aspect of the policy. *See Sypniewski,* 307 F.3d at 268-69 ("When policies focus broadly on listeners' reactions, without providing a basis for limiting application to disruptive expression, they are likely to cover a substantial amount of protected speech."). After all, who among us has never made what he thought was an innocuous remark only to learn that somebody else took it as maliciously pointed at them?

Fourth, the policy here, unlike that in *Saxe,* covers much of what lies at the core of political and symbolic speech, such as the presence or defacing of political symbols, hanging of effigies, flying of flags, etc. I do not dispute that a school can ban certain political symbols based on experience indicating that those symbols may lead to serious disruption or violence. *See Sypniewski,* 307

F.3d at 257-58; *West,* 206 F.3d at 1366. But the wholesale banning of the Stars and Bars, swastikas and the like, without any showing of past disruption or likelihood of future disruption, simply to spare the feelings of students who might be offended by them, strikes me as constitutionally impermissible.[13] As the *Saxe* court noted, "[t]he Supreme Court has held time and again, both within and outside of the school context, that the mere fact that someone might take offense at the content of speech is not sufficient justification for prohibiting it." *Saxe,* 240 F.3d at 215 (citing cases).

Last but not least, the policy here (unlike that in *Saxe*) prohibits not only speech that denigrates others, but also any speech that the student seeks to justify by expressing pride in his own traits. We are taught to take pride in who we are; it is, in a sense, the American way. It seems particularly chilling to free expression to restrain speech that expresses pride in one's own religion, ethnicity, sexual orientation, etc.

The problems posed by the policy here, not only for Harper but for many other students, are not theoretical or trivial. Assuming, as we must, that on the next Day of Silence Harper will not be allowed to wear a t-shirt expressing his interpretation of Romans 1:27, what exactly

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[13] There is language in the imprecisely written opinion in *Muller v. Jefferson Lighthouse School,* 98 F.3d 1530 (7th Cir. 1996), suggesting that a school could restrict "speech that could crush a child's sense of self-worth." *Id.* at 1539-40. *Muller* involved elementary-school children and probably the best way to read this phrase is as adapting the *Tinker-Fraser* standard to younger children. Only Judge Rovner's concurrence is entirely clear on this point. *Id.* at 1546-47 (Rovner, J., concurring).

can he say or wear? Would a t-shirt quoting Romans 1:27[14] be permissible, or is it prohibited because a homosexual student might interpret it as "motivated by bias against him/her"? How about a t-shirt with the message "Straight and Proud of It"? Is this a protected "positive" message, or is it the dreaded "exalting own . . . sexual orientation" and therefore hate behavior? Indeed, is there anything at all that Harper and others of his view can say or do to distance themselves from the Day of Silence proceedings without running the risk that another student will take it personally? May Harper have a discussion at lunchtime where he says: "Homosexuality is sinful"? On his way home from school, may he tell another student a joke disparaging the movie *Brokeback Mountain*? Once he gets home, can he post criticism of the Day of Silence on his MySpace page? Given the broad language of the policy, I believe any and all of these could be punished by the school authorities as hate behavior.

Nor is Harper alone. Consider those who participate in the Day of Silence. They, of course, believe they are doing so to promote tolerance and equality. But others – like Harper – might view it as an effort to exalt homosexuality and denigrate their own sexual orientation and religious beliefs. Relying on the same overbroad policy that the school used to ban Harper's t-shirt, the school could, if it chose, easily ban the Day of Silence activities as demeaning the sexual orientation of straight students, or the religious beliefs of Christians like Harper.

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[14] "And likewise also the men, leaving the natural use of the woman, burned in their lust one toward another; men with men working that which is unseemly, and receiving in themselves that recompence of their error which was meet." Romans 1:27 (King James).

All manner of other speech, from the innocuous to the laudable, could also be banned or punished under the school's hate speech policy. May a student wear a Black Pride t-shirt, or does this denigrate white and Asian students? May a student wear a t-shirt saying "I love Jesus," or will this make Jews, Muslims and Druids feel it's an attack on their religions? May a student wear a t-shirt saying "Proud to be a Turk," or will this cause bad vibrations for the Greeks and Armenians in the school? Will a student be disciplined for disruption if, during a lunch-time discussion, he argues forcefully that the State of Israel oppresses Palestinians and, when called on it, defends himself, saying: "I said it because I'm proud to be a Muslim."?

The types of speech that could be banned by the school authorities under the Poway High School hate policy are practically without limit. Any speech code that has at its heart avoiding offense to others gives anyone with a thin skin a heckler's veto – something the Supreme Court has not approved in the past. *See, e.g., Reno v. ACLU,* 521 U.S. 844, 880 (1997); *Forsyth County v. Nationalist Movement,* 505 U.S. 123, 134 (1992); *Hustler Magazine, Inc. v. Falwell,* 485 U.S. 46, 55-56 (1988). If the policy in *Saxe* was enjoined as overbroad, the policy here must be enjoined as well.[15]

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[15] Insofar as *West v. Derby Unified School District No. 260* reaches a contrary conclusion on this issue – as I'm afraid it probably does, *see* 206 F.3d at 1367-68 – I must respectfully disagree with my Tenth Circuit colleagues.

Conclusion

Because the *only* disputed issue before us is likelihood of success on the merits, I believe we have no choice but to reverse. I think it is highly likely that Harper will succeed on his t-shirt claim, and I have no doubt he will succeed as to his overbreadth challenge.

That having been said, I acknowledge that the school authorities here found themselves in a difficult situation and, in light of the circumstances, acted well. Harper was not disciplined for wearing his t-shirt; the school authorities merely tried to defuse what they saw as a volatile situation.

I also have sympathy for defendants' position that students in school are a captive audience and should not be forced to endure speech that they find offensive and demeaning. There is surely something to the notion that a Jewish student might not be able to devote his full attention to school activities if the fellow in the seat next to him is wearing a t-shirt with the message "Hitler Had the Right Idea" in front and "Let's Finish the Job!" on the back. This t-shirt may well interfere with the educational experience even if the two students never come to blows or even have words about it.

Perhaps school authorities should have greater latitude to control student speech than allowed them by Justice Fortas's Vietnam-era opinion in *Tinker.* Perhaps Justice Black's concerns, expressed in his *Tinker* dissent, *see Tinker,* 393 U.S. at 524-26 (Black, J., dissenting), should have been given more weight, *see Karp,* 477 F.2d at 174. Perhaps the narrow exceptions of *Tinker* should be broadened and multiplied. Perhaps *Tinker* should be overruled. But that is a job for the Supreme Court, not for

us. *See Boroff*, 220 F.3d at 475 (Gilman, J., dissenting). While I sympathize with my colleagues' effort to tinker with the law in this area, I am not convinced we have the authority to do so, which is why I must respectfully dissent.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TYLER CHASE HARPER, a minor, by and through his parents Ron and Cheryl Harper; et al., Plaintiffs-Appellants, V. POWAY UNIFIED SCHOOL DISTRICT; et al., Defendants-Appellees.	No. 04-57037 D.C. No. CV-04-01103-JAH **JUDGMENT** (Filed Aug. 3, 2006)

Appeal from the United States District Court for the Southern District of California (San Diego).

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California (San Diego) and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is **AFFIRMED, REMANDED**.

Filed and entered 04/20/06

APPENDIX C

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TYLER CHASE HARPER, a minor, by and through his parents Ron and Cheryl Harper; RON HARPER; CHERYL HARPER,

Plaintiffs-Appellants,

v.

POWAY UNIFIED SCHOOL DISTRICT; JEFF MANGUM; LINDA VANDERVEEN; PENNY RANFTYLE; STEVE MCMILLAN; ANDY PATAPOW, All Individually and in their official capacity as Members of the Board of the Poway Unified School District; DONALD A. PHILLIPS, Individually, and in his official capacity as Superintendent of the Poway Unified School District; SCOTT FISHER, Individually and in his official capacity as Principal of Poway High School; LYNELL ANTRIM, Individually and in her official capacity as Assistant Principal of Poway High School; ED GILES, Individually and in his official capacity as Vice Principal of Poway High School; DAVID LEMASTER, Individually and in his official capacity as Teacher of Poway High School; DOES 1 THROUGH 20, INCLUSIVE,

Defendants-Appellees.

No. 04-57037

D.C. No. CV-04-01103-JAH Southern District of California, San Diego

ORDER AMENDING OPINION

Filed May 31, 2006

Before: Stephen Reinhardt, Alex Kozinski, and Sidney R. Thomas, Circuit Judges.

ORDER

The majority opinion filed April 29, 2006, is hereby amended as follows:

> 1. At Slip Op. at 4676, footnote 28, at the end of the footnote, add: "We do not exclude, however, the possibility that some verbal assaults on the core characteristics of majority high school students would merit application of the *Tinker* "intrusion upon the rights of other students" prong. That question is not presently before us."

The dissenting opinion filed April 29, 2006, is hereby amended as follows:

> 1. At Slip Op. at 4710, footnote 11, between <*Id.* at 4667.> and <Read broadly, this would protect>, add: "The majority also does not "exclude . . . the possibility that some verbal assaults on the core characteristics of majority high school students would merit application of the *Tinker* 'intrusion upon the rights of other students' prong." *Id.* at ___ n.28.

Appellants' petition for rehearing en banc is still pending before this court.

APPENDIX D

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

TYLER CHASE HARPER, a minor, by and through his parents, RON and CHERYL HARPER, Plaintiff, v. POWAY UNIFIED SCHOOL DISTRICT; et al., Defendants.	Civil No. 04CV1103 JAH(POR) **ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS [FED.R.CIV.P. 12(b)(6) [DOC. # 14] AND DENYING PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION [DOC. # 18]** (Filed Nov. 4, 2004)

INTRODUCTION

Now before the Court are defendants' motion to dismiss the complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) and plaintiff's motion for preliminary injunction. After careful consideration of the pleadings and relevant exhibits submitted, and for the reasons set forth below, this Court GRANTS IN PART and DENIES IN PART defendants' motion to dismiss and DENIES plaintiff's motion for preliminary injunction in its entirety.

BACKGROUND

I. Factual Background[1]

Plaintiff Tyler Chase Harper ("plaintiff")[2] is a minor and enrolled at Poway High School ("the School") in the Poway Unified School District. Compl. ¶ 21. Plaintiff is a Christian with the firmly held religious belief that homosexuality is immoral. *Id.* ¶¶ 22-23. In the weeks prior to April 21, 2004, plaintiff became aware that the School planned to observe a "Day of Silence" that he believed "endorsed, encouraged, subsidized and promoted" homosexual activity. *Id.* ¶¶ 24, 26. Plaintiff felt compelled to communicate his "sincerely-held religious beliefs" regarding "the Biblical condemnation of homosexual behavior to others in his school and his community." *Id.* ¶ 25. Therefore, on April 21, 2004 (the "Day of Silence"), plaintiff wore a T-shirt to the School on which the words "I WILL NOT ACCEPT WHAT GOD HAS CONDEMNED" had been placed on the front and the words "HOMOSEXUALITY IS SHAMEFUL 'Romans 1:27'" had been placed on the back. *Id.* ¶¶ 28-29, 31.

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[1] These background facts are taken directly from plaintiffs' complaint and are accepted as true for purposes of defendants' motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6). *See Thompson v. Davis*, 295 F.3d 890, 895 (9th Cir. 2002); *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337-38 (9th Cir. 1996).

[2] Although the instant complaint lists Tyler Chase Harper's parents, Ron and Cheryl Harper, as plaintiffs, *see* Compl. ¶ 8, this Court notes there are no allegations or causes of action brought by either parent. The only reference in the body of the complaint to either parent is Ron Harper's statements regarding his contact with school officials about the incident at issue. *See id.* ¶¶ 63-68. This Court finds that Ron and Cheryl Harper are not plaintiffs but are merely listed as suing on behalf of their minor son. Accordingly, all references to the plaintiff in this matter refer only to Tyler Chase Harper.

In addition, on April 22, 2004, plaintiff wore a different T-shirt to school with the words "BE ASHAMED" "OUR SCHOOL EMBRACED WHAT GOD HAS CONDEMNED" placed on the front and the words "HOMOSEXUALITY IS SHAMEFUL Romans 1:27" placed on the back. *Id.* ¶¶ 32-33. During Plaintiff's second period class on April 22, 2004, the classroom teacher, defendant David LeMaster ("LeMaster"), informed plaintiff that he "was in violation of the school's dress code" and told plaintiff to remove the shirt "or leave class and report directly to the school office." *Id.* ¶ 34. Plaintiff apparently decided not to remove the T-shirt but, instead, met with the School's Vice Principal, defendant Lynell Antrim ("Antrim"). *See id.* ¶ 35. Antrim informed plaintiff that the T-shirt was "clearly in violation of the dress code because it had a 'homemade' message, as opposed to a printed or more permanent message on the garment." *Id.* Antrim further informed plaintiff that "the words on the T-shirt were 'inflammatory,'" and that plaintiff should replace the shirt if he wished to return to class. *Id.* ¶¶ 36, 37. Plaintiff "politely" refused to change the shirt and was directed to wait to discuss the matter with the principal. *Id.* ¶ 38.

The School's Principal, defendant Scott Fisher ("Fisher"), then interviewed plaintiff, during which Fisher "repeatedly" inquired as to why plaintiff wore the T-shirt on both days. *Id.* ¶ 41. Fisher also informed plaintiff that the T-shirt was "too 'aggressive' and that wearing it would not be tolerated at [the School]." *Id.* In addition, Fisher further informed plaintiff that any punishment meted out would be the same whether the T-shirt had been homemade or pre-manufactured "because the content was inflammatory." *Id.* ¶ 42. Finally, Fisher told plaintiff that, due to his courteousness and respect toward school authorities,

plaintiff would be required to remain in an office during the rest of the school day, not be allowed to leave the office without an escort, and be required to depart the school grounds immediately thereafter "by the most direct route." *Id.* ¶ 43, 44. Plaintiff remained in an office as directed. *Id.* ¶ 46.

Plaintiff received visits from "various school security personnel" while he remained in the office. *Id.* ¶ 47. In particular, a former coach of plaintiff's questioned him as to whether wearing the T-shirt "was 'worth it.'" *Id.* ¶ 48. A deputy sheriff also questioned plaintiff while he was in the School's office. *See Id.* ¶ 49. The deputy sheriff, wearing a badge and carrying sidearm, informed plaintiff he was "there to determine if [plaintiff] was a dangerous student, to find out why he wore the particular T-shirt, and to determine if he was going to engage in similar behavior in the future." *Id.* The deputy sheriff suggested plaintiff should "not be offensive to others" because the Christian faith is not based on hate and further informed plaintiff that the T-shirt was " 'inflammatory' and 'could encourage uprising and violence against homosexuals.'" *Id.* ¶¶ 51, 52.

At the end of the school day, plaintiff was directed to defendant Vice Principal Ed Giles' ("Giles") office. *Id.* ¶ 53. Giles explained to plaintiff that Giles knew plaintiff's family and youth pastor and that Giles was a Christian believer. *Id.* ¶ 55. Giles further explained to plaintiff that when Giles came to school "he had to leave his faith 'in the car'" and "advised [plaintiff] that when he comes to [the School] . . . he too must 'leave his faith in the car.'" *Id.* ¶ 56, 57. Plaintiff informed Giles he could not do so. *Id.* ¶ 58. Plaintiff was then informed to leave school directly without stopping at his locker for any homework assignments, to which he complied. *Id.* ¶ 59-61.

Just prior to the end of the school day, Giles telephoned plaintiff's father, Ron Harper ("Ron Harper"), and informed him of plaintiff's detention and suspension for the day due to the T-shirt. *Id.* ¶ 62, 63. Ron Harper was initially given the reason for the suspension as being due to the homemade nature of the T-shirt but, after further inquiry, Giles explained that, based on his view, the message on the T-shirt was "negative" and "'only positive community messages were allowed.'" *Id.* ¶ 64-66. The next day, Ron Harper went to the School to discuss the previous day's suspension and was told that plaintiff conducted himself respectfully and honorably and that "no disruptions, altercations or other incidents among students at the school" had occurred due to his son's T-shirt. *Id.* ¶ 67, 68.

II. Procedural History

The instant complaint was filed on June 2, 2004. Plaintiff's complaint, filed pursuant to 42 U.S.C. § 1983, alleges that defendants' actions violated plaintiff's rights: (1) to freedom of speech under the First Amendment to the United States Constitution; (2) to free exercise of religion under the First Amendment; (3) to equal protection under the Fourteenth Amendment; (4) to due process under the Fourteenth Amendment; (5) under the Establishment Clause of the First Amendment; and (6) pursuant to California Civil Code § 52.1. Plaintiff seeks declaratory and injunctive relief as well as nominal and punitive damages.

In lieu of an answer, defendants filed the instant motion to dismiss on June 22, 2004, which was set for hearing on July 30, 2004. Defendants move to dismiss all

of plaintiff's claims on the grounds that each cause of action fails to state a claim upon which relief may be granted. In the alternative, defendants move to dismiss plaintiff's damages claims on the grounds that they are barred pursuant to the immunity afforded under the Eleventh Amendment and move to dismiss the individual defendants on qualified immunity grounds.

On July 12, 2004, plaintiff filed his motion for preliminary injunction. The parties subsequently stipulated to reschedule the hearing date for both motions to August 26, 2004. Both parties filed their respective oppositions to the motions on August 12, 2004. The parties' reply briefs were each filed on August 19, 2004. On the Court's own motion, the hearing date was rescheduled to September 16, 2004.

DISCUSSION

I. Defendants' Motion to Dismiss Pursuant to Fed.R.Civ.P. 12(b)(6)

A. Legal Standard

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) tests the sufficiency of the complaint. *Navarro v Block,* 250 F.3d 729, 732 (9th Cir. 2001). Dismissal of a claim under this rule is appropriate only where "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957); *Navarro,* 250 F.3d at 732. Dismissal is warranted under Rule 12(b)(6) where the complaint lacks a cognizable legal theory. *Robertson v. Dean Witter Reynolds, Inc.,* 749 F.2d 530, 534 (9th Cir. 1984); *see Neitzke v. Williams,* 490 U.S. 319, 326 (1989) ("Rule 12(b)(6) authorizes a court to

dismiss a claim on the basis of a dispositive issue of law."). Alternatively, a complaint may be dismissed where it presents a cognizable legal theory yet fails to plead essential facts under that theory. *Robertson,* 749 F.2d at 534.

In reviewing a motion to dismiss under Rule 12(b)(6), the court must assume the truth of all factual allegations and must construe all inferences from them in the light most favorable to the nonmoving party. *Thompson v. Davis,* 295 F.3d 890, 895 (9th Cir. 2002); *Cahill v. Liberty Mut. Ins. Co.,* 80 F.3d 336, 337-38 (9th Cir. 1996). However, legal conclusions need not be taken as true merely because they are cast in the form of factual allegations. *Ileto v. Glock, Inc.,* 349 F.3d 1191, 1200 (9th Cir. 2003); *Western Mining Council v. Watt,* 643 F.2d 618, 624 (9th Cir. 1981). When ruling on a motion to dismiss, the court may consider the facts alleged in the complaint, documents attached to the complaint, documents relied upon but not attached to the complaint when authenticity is not contested, and matters of which the Court takes judicial notice. *Parrino v. FHP, Inc.,* 146 F.3d 699, 705-06 (9th Cir. 1998); *Lee v. City of Los Angeles,* 250 F.3d 668, 688-89 (9th Cir. 2001).

B. Judicial Notice

As an initial matter, defendants seek this Court's judicial notice of the instant complaint, a complaint filed in Superior Court, and the Poway Unified School District Administration Regulation 5.28.1. *See* Defts' Req. for Jud. Not. Plaintiff objects to the Court taking judicial notice of the Superior Court complaint because the complaint supplies facts essential to support a contention without the formal introduction of such evidence and the allegations

contained in the complaint are disputed. Opp. at 10 (citing *M/V Am. Queen v. San Diego Marine Constr. Corp.*, 708 F.2d 1483, 1491 (9th Cir. 1983); *In re Mora*, 199 F.3d 1024, 1026 n. 3 (9th Cir. 1999)). Plaintiff does not object to taking judicial notice of the administrative regulations. *See id.* Defendants do not address plaintiff's objection in their reply brief. This Court finds it inappropriate, on motion to dismiss under Rule 12(b)(6), to take judicial notice of a complaint filed in another court without any indication as to the disposition of the allegations contained therein and with no agreement between the parties as to the truth of the facts alleged. As such, this Court declines to take judicial notice of the complaint filed in San Diego County Superior Court. This Court takes judicial notice of the complaint filed in the instant case and the Poway Unified School District Administrative Regulation 5.28.1[3], copies of which are attached to defendants' request for judicial notice. *See* Defts' Req. for Jud. Not., Exhs. A-C. Accordingly, this Court SUSTAINS plaintiff's objection and GRANTS IN PART and DENIES defendants' request to take judicial notice. This Court, therefore, confines its review to the complaint and the documents judicially noticed.

[3] This Court finds it appropriate to consider the full text of this document even though it is quoted only in part in the complaint. *See In re Stac Electronic Securities Litigation*, 89 F.3d 1399, 1405 n.4 (9th Cir. 1996).

C. Analysis

1. Failure to State a Claim

a. First Cause of Action (Freedom of Speech)

i. Legal Standard

Public school students "do not 'shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.'" *Chandler v. McMinnville School District,* 978 F.2d 524, 527 (9th Cir. 1992) ("*Chandler*") (quoting *Tinker v. Des Moines Indep. Community School Dists.,* 393 U.S. 503, 506 (1969) ("*Tinker*")). In upholding the students' right to engage in nondisruptive, passive expression of a viewpoint, the Supreme Court, in *Tinker,* was careful to note that the case did "not concern speech or action that intrudes upon the work of the schools or the rights of other students." *Bethel School Dist. No. 403 v. Fraser,* 478 U.S. 675, 680 (1985) ("Fraser"); *Tinker,* 393 U.S. at 508. Consistently, the Supreme Court later held that public school students "cannot be punished merely for expressing their personal views on the school premises . . . unless school authorities have reason to believe that such expression will 'substantially interfere with the work of the school or impinge upon the rights of other students.'" *Hazelwood v. Kuhlmeier,* 484 U.S. 260, 266 (1988) ("Hazelwood") (quoting *Tinker,* 393 U.S. at 509). "School officials may suppress speech that is vulgar, lewd, obscene, or plainly offensive without a showing that such speech occurred during a school-sponsored event or threatened to substantially interfere with the school's work." *Chandler,* 978 F.2d at 529 (citing *Fraser,* 478 U.S. 675).

"The[ ] fundamental values of 'habits and manners of civility' essential to a democratic society must, of course,

include tolerance of divergent political and religious views, even when the views expressed may be unpopular. But these 'fundamental values' must also take into account consideration of the sensibilities of others, and in the case of a school, the sensibilities of fellow students." *Fraser,* 478 U.S. at 681. *See id.* at 682 ("the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings.")

It is also well settled that "courts are not necessarily in the best position to decide whether speech restrictions are appropriate. 'The determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board,' and not with the federal courts. *Chandler,* 978 F.2d at 527 (quoting *Fraser,* 478 U.S. at 683, 685).

The Ninth Circuit has organized student speech into three distinct categories governed by different legal standards: (1) vulgar, lewd, obscene, and plainly offensive speech, which is governed by *Fraser*; (2) school-sponsored speech, which is governed by *Hazelwood*; and (3) all other speech not fitting into the other two categories, which is governed by *Tinker. Chandler,* 978 F.2d at 529.

ii. Analysis

Defendants contend that Plaintiff's speech falls under either *Fraser* or *Tinker.*[4] Mot. at 6. Defendants argue that, because the speech at issue here is "plainly offensive," *Fraser* controls, but, should the Court find the speech not

[4] Neither party contends that the speech here falls under the *Hazelwood* category of speech.

plainly offensive, then *Tinker* controls. *Id.* Plaintiff opposes on the grounds that (1) the speech was not offensive under *Fraser*; and (2) censoring the speech was not necessary to avoid substantial interference with schoolwork or discipline nor infringement upon others' rights under *Tinker*.[5] Opp. at 2.

Defendants contend that "if the Court finds the phrase 'Homosexuality is shameful' [to be] patently offensive, then school officials properly squelched that speech without violating the First Amendment." Mot. at 7. Defendants argue that the phrase, worn on a T-shirt and visible to homosexual students at school, is "hateful, harassing, hurtful, and therefore plainly offensive." *Id.*[6]

Plaintiff, in opposition, argues that the *Fraser* decision was based entirely upon the vulgar, indecent, and lewd content of the speech and did not hold that merely

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[5] Plaintiff initially argues that defendants' actions were not viewpoint neutral as required for government actors. *See* Opp. at 2-3. This Court notes that, as defendants point out, school speech is not governed by the same rules that apply to government actors and public speech. *See* Mot. at 7 (citing *Hazelwood*, 484 U.S. at 266; *Fraser*, 478 U.S. at 685). Accordingly, insofar as plaintiff argues defendants must not censor speech at school unless the censorship is viewpoint neutral, this Court finds the argument unavailing.

[6] Defendants suggest, for a more clear understanding, a substitution of the word "homosexuality" with another protected classification. Mot. at 7 (suggesting substitution of the word "women" or the phrase "black skin" for "homosexuality"). Defendants also claim that "cloak[ing the phrase] in the veil of religion" does not negate the offensiveness of the speech and, to allow religion to shield hateful speech, "the Ku Klux Klan would turn the Bible from a shield to a sword to spew hatred." *Id.* at 7-8. Plaintiff does not address either of these notions in his opposition. For the reasons stated herein, the Court finds it inappropriate to address these contentions under the analysis required for a motion to dismiss.

offensive speech is protected. Opp. at 4-5. Plaintiff claims that defendants' position seeks to give schools "authority to prohibit speech merely because the speech might offend someone," which is a concept courts have not endorsed, citing to various courts not within the Ninth Circuit. *Id.* at 5 (citing, *inter alia, Saxe v. State College Area School Dist.,* 240 F.3d 200, 216 (3rd Cir. 2001) (finding *Fraser* inapplicable because the policy in question did not involve vulgar and lewd speech); *Barber v. Dearborn Public School,* 286 F.Supp.2d 847, 856 (ED. Mich. 2003) (finding *Fraser* inapplicable because the speech did not refer to alcohol, drugs, or sex and was not obscene, lewd or vulgar); *Sypniewski v. Warren Hills Regional Board,* 307 F.3d 243, 254 (3rd Cir. 2002) (applying *Tinker* because speech not indecent requiring application of *Fraser*). However, as defendants point out in reply, the doctrine of *stare decisis* requires this Court to follow Ninth Circuit precedent. *See* Reply at 1 (citing *Zuniga v. United Can Co.,* 812 F.2d 443, 450 (9th Cir. 1987) ("District courts are, of ccurse, bound by the law of their own circuit . . . "). Under Ninth Circuit precedent, as set forth in *Chandler,* student speech may be banned by the School without offending the First Amendment if the speech is found to be vulgar, lewd, obscene, *or* plainly offensive pursuant to *Fraser. Chandler,* 978 F.2d at 530 (emphasis added). Thus, this Court finds, even though the speech here is clearly not vulgar, lewd or obscene, a determination of whether the speech is plainly offensive is required under *Fraser.*

The parties disagree as to the definition of "plainly offensive" as used by the *Chandler* court. *See* Opp. at 4-5; Reply at 2. This Court has found no case law that specifically defines the phrase. In *Chandler,* the Ninth Circuit looked to a dictionary definition of one word in the suppressed

expression and viewed it "in the context most applicable to the case" to determine whether the expression was "plainly offensive." *Chandler*, 978 F.2d at 530. The *Chandler* court recognized that a dictionary definition "may not be determinative in all cases." *Chandler,* 978 F.2d at 530. In *Fraser,* in evaluating whether the speech was vulgar, lewd and plainly offensive, the Court examined the pervasive sexual innuendo in the expression. *Fraser,* 478 U.S. at 683. The Court considered the maturity and other characteristics of the audience, the speech as a whole, the listeners' reaction to it, whether it was acutely insulting in light of the experience of school officials and the officials' responsibility to protect and educate children. In other words, the Court in *Fraser,* weighed the school officials' reaction (suppression of the expression) against the context of the expression and the environment in which it was delivered, as known to experienced school officials, to determine if it was properly suppressed. The Court finds that the *Fraser* approach (*i.e.*, going beyond dictionary meanings) in determining the nature of the speech is appropriate here.

First, the Court considers the dictionary meanings. The *American Heritage Dictionary* defines 'offensive' as "[d]isagreeable to the senses" and "[c]ausing anger, displeasure, resentment, or affront." *The American Heritage Dictionary* at 947 (3rd ed. 1997). "Plainly" is defined as "unmistakably" ('plain' is often used informally for 'plainly'). *See http://dictionary.reference.com.* This Court finds that a dictionary definition may be a starting point but is certainly not the end of the inquiry. Based upon a review of the complaint and the School's policy, this Court has no difficulty determining that the expression involved here is, without doubt, clearly derogatory. The balance of

the inquiry, however, is whether it is plainly offensive, that is unmistakably or obviously offensive. In this Court's view, the determination of whether speech is plainly offensive cannot be conclusively determined.

Without extrinsic evidence to support defendants' position, defendants invite this Court to infer sufficient facts and circumstances in defendants' favor to support their position that the expression is plainly offensive or, in the alternative, if it is not, the defendants acted properly to suppress plaintiff's expression. This Court is mindful that, in deciding a motion to dismiss for failure to state a claim upon which relief may be granted, it must view the facts alleged, as well as any inferences drawn from those facts, in the light most favorable to plaintiff, not to defendants. As such, this is an invitation the Court is without authority to accept. *See Thompson,* 295 F.3d at 895; *Cahill,* 80 F.3d at 337-38.

Defendants further contend, if there is no finding that the speech is plainly offensive, that censorship of the speech cannot be found violative of the First Amendment based on *Tinker.* The Supreme Court, in *Tinker,* found student speech may be suppressed if it "materially disrupts classwork or involves substantial disorder or invasion of the rights of others." *Tinker,* 393 U.S. at 513. To satisfy the First Amendment, "school officials must justify their decision by showing 'facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities,'" *LaVine v. Blaine School District,* 257 F.3d 981, 989 (9th Cir. 2001) (quoting *Tinker,* 393 U.S. at 514), or the "invasion of the rights of others." *Tinker,* 393 U.S. at 513.

Defendants contend that the speech is disruptive and violative of the rights of others. *See* Mot. at 8-10. Defendants argue that school officials were justified in their actions due to the reasonable belief that the speech violated the rights of other students and faculty. *See id.* at 8-10; Reply at 2-3. Specifically, defendants argue, based on the facts pled in the instant complaint, and coupled with the material sought to be judicially noticed, the Court should determine "that District officials could reasonably conclude . . . the rights of other students were invaded by plaintiff wearing the T-shirt to class." Mot. at 8. Defendants also contend the school officials' belief that the speech at issue was disruptive is evidenced by the sheriff's deputy's statement of his opinion that such was the case and by a complaint filed in San Diego County Superior Court which defendants seek the Court to take judicial notice. *Id.* at 9; *see* Deft's Req. for Jud. Not., Exh. B. This Court has, however, declined to take judicial notice of the San Diego County Superior Court complaint referred to by defendants.

Based solely on all the allegations presented in the instant complaint, viewed in the light most favorable to plaintiff, this Court finds that the deputy sheriffs statement of his belief that the speech at issue 'could encourage uprising and violence against homosexuals,'" Compl. ¶¶ 51, 52, is insufficient in itself to lead the Court to conclude as a matter of law that school officials reasonably believed the speech "forecast substantial disruption of or material interference with school activities'" to justify the censorship. *LaVine,* 257 F.3d at 989. In addition, this Court's review of the complaint reveals that plaintiff has alleged no facts indicating any other persons' rights were violated by the speech.

Extrinsic evidence may assist the factfinder in determining the pervasiveness of the expression in light of the subject environment under *Fraser,* or the School's rationale for its response to it under *Tinker.* On the other hand, in the context of the assertions in the complaint viewed as true for purposes of this motion, there may be no reasonable limitation allowed on plaintiff's expression. As Justice Blackmun stated in considering, the outer reaches of the First Amendment's right to free speech:

> There indeed may be no such limit, but when citizens assert, not casually but with deep conviction that the [expression occurs] at a place and in a manner that [may be] taunting and overwhelmingly offensive [to others] of that place, that assertion, uncomfortable as it may be for judges, deserves to be examined. It just might fall into the same category as one's right to cry fire in a crowded theater, for the character of every act depends upon the circumstances in which it is done.

Smith v. Collin, 439 U.S. 916, 918 (1978) (Justice Blackmun dissenting).

Accordingly, defendants' motion to dismiss plaintiff's first cause of action for violation of the First Amendment's right to freedom of speech based on the failure to state a claim pursuant to Fed.R.Civ.P. 12(b)(6) is DENIED.

b. Second Cause of Action (Free Exercise of Religion)

Defendants contend that plaintiff's second cause of action based on violation of plaintiff's right to free exercise of religion fails as a matter of law. *See* Mot. at 13. The Free

Exercise Clause of the First Amendment, made applicable to the states through the Fourteenth Amendment, *Cantwell v. Connecticut,* 310 U.S. 296, 303 (1940), "forbids all laws 'prohibiting the free exercise' of religion." *McDaniel v. Paty,* 435 U.S. 618, 620 (1978) (quoting U.S. Const. amend. I). This Clause protects not only the right to hold a particular religious belief, but also the right to engage in conduct motivated by that belief. *Employment Div. v. Smith,* 494 U.S. 872, 877 (1990) (recognizing that "the exercise of religion often involves not only belief and profession but the performance of (or abstention from) physical acts . . . ") (internal quotation marks omitted).

This Court notes that "'the Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government.'" *Lyng v. Northwest Indian Cemetery Protective Ass'n,* 485 U.S. 439, 451 (1988) (quoting *Sherbert v. Verner,* 374 U.S. 398, 412 (1963) (Douglas, J., concurring)). In the First Amendment context, religious exercise typically refers to an act or practice central to a particular religion. *Hernandez v. Commissioner,* 490 U.S. 680, 699 (1989) (religious exercise defined as observation of central religious belief); *Thomas v. Review Board of the Indiana Employment Sec. Div.,* 450 U.S. 707, 718 (1981) (religious exercise defined as behavior compelled by faith); *see also Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton,* 536 U.S. 150, 162 (finding door-to-door canvassing a religious exercise). Government burdens free exercise by directly restraining or indirectly discouraging individuals from engaging in such practices. *Sherbert,* 374 U.S. at 404 n.5 (citing *American Communications Assn. v. Douds,* 339 U.S. 382, 402 (1950); *see also School Dist. of Abington Twp., Pa. v. Schempp,* 374 U.S.

203, 223 (1963) ("[I]t is necessary in a free exercise case for one to show the coercive effect of the [government act] as it operates against him in the practice of his religion.").

Defendants argue that plaintiff has alleged no facts showing he was "prevented from engaging in conduct required by his religion." Mot. at 14. Defendants point out that "[p]laintiff's right of free exercise does not relieve [p]laintiff of his obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his own religion prescribes (or proscribes).'" *Id.* (quoting *Smith,* 494 U.S. at 879). According to defendants, the School's neutral policy prohibiting harassment on the bases of race, gender, national origin, religion, and sexual orientation applies to all students, including plaintiff, "regardless of his religious beliefs." *Id.*

Plaintiff, in opposition, claims[7] the complaint alleges that "[d]efendants attempted to change [p]laintiff's religious views regarding homosexuality and his duty to warn his classmates of its dangers" and was punished for expressing his religious views. *Id.* at 16 (citing Compl.

[7] Plaintiff contends, in opposition, that "[t]his case presents a classic hybrid rights case" which the Supreme Court, in *Smith*, found requires strict scrutiny. Opp. at 15 (citing *Swanson v. Guthrie Ind. Sch. Dist.,* 135 F.3d 695, 700 (10th Cir. 1998)). Plaintiff concedes that the School's prohibition on speech is "arguably" neutral but, when viewed with plaintiffs other constitutional claims, the prohibition becomes hybrid and, thus, a colorable free exercise claim. *Id.* This Court notes that before it can apply a higher level of scrutiny that may be required for hybrid rights cases, there must first be a colorable free exercise claim. Thus, if the Court determines that there is a colorable free exercise claim alleged, defendants' motion must be denied. Therefore, a determination of whether this case presents a hybrid rights case is unnecessary for purposes of the instant motion.

¶¶ 49-57). Based on these allegations, plaintiff contends that he has stated a claim for violation of his free exercise rights. *Id.*

Defendants, in reply, point out that the instant complaint does not allege defendants attempted to alter plaintiff's religious beliefs or punish him for expressing his religious views. Reply at 5. Defendants contend that defendant Giles' advice to plaintiff to "leave his faith in the car" is insufficient to state a free exercise claim. *Id.* Defendants also claim that plaintiff does not allege he was punished by defendants in any way. *Id.*

The instant complaint alleges plaintiffs "sincerely-held religious beliefs . . . compel him to express his opposition to homosexual behavior" and defendants' "censorship of religious expression that is critical of homosexual behavior" is not justified. Compl. ¶¶ 92, 96. Plaintiff alleges defendant Giles advised him that "he . . . must 'leave his faith in the car.'" while on school premises. *Id.* ¶ 57. As previously discussed, this Court must view the allegations presented in the light most favorable to plaintiff, being mindful that dismissal of a claim under Rule 12(b)(6) is appropriate only where "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *See Thompson,* 295 F.3d at 895; *Cahill*, 80 F.3d at 337-38. *Conley,* 355 U.S. at 45-46; *Navarro,* 250 F.3d at 732. This Court finds that the complaint, as pled, sufficiently alleges a claim for violation of plaintiff's free exercise rights. Accordingly, defendants' motion to dismiss plaintiff's second cause of action based on violation of the First Amendment's right to free exercise of religion is DENIED.

c. Third Cause of Action (Equal Protection)

Defendants contend that plaintiff's third cause of action fails to state a claim for violation of the plaintiff's right to equal protection under the law. The "Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439 (1985); *Shaw v. Reno,* 509 U.S. 630 (1993). "The guarantee of equal protection is not a source of substantive rights or liberties, but rather a right to be free from invidious discrimination in statutory classifications and other governmental activity." *Harris v. McRae,* 448 U.S. 297, 322 (1980) (citations omitted).

Conclusory allegations of discrimination are insufficient to withstand a motion to dismiss, however, unless the plaintiff alleges facts which may prove invidious discriminatory intent. *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 265 (1977). Therefore, when an equal protection violation is alleged, the plaintiff must plead facts to show that the defendant "acted in a discriminatory manner and that the discrimination was intentional." *FDIC. v. Henderson,* 940 F.2d 465, 471 (9th Cir. 1991) (citations omitted); *Reese v. Jefferson School Dist. No. 141,* 208 F.3d 736, 740 (9th Cir. 2000), 2000). "'Discriminatory purpose' . . . implies more than intent as volition or intent as awareness of consequences. It implies that the decision maker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon

an identifiable group." *Personnel Administrator of Massachusetts v. Feeney,* 442 U.S. 256, 279 (1979).

Equal protection claims require strict scrutiny if the legislation discriminates against a suspect class or impinges upon a fundamental right. *Nordlinger v. Hahn,* 505 U.S. 1, 10 (1992). The Equal Protection Clause may give rise to a cause of action even if the plaintiff does not allege membership in a class or group. *See Village of Overbrook v. Olech,* 528 U.S. 562, 564 (2000). However, this type of equal protection challenge is evaluated under a rational-basis test to determine whether the legislation at issue is irrational or wholly arbitrary. *Conti v. City of Fremont,* 919 F.2d 1385, 1389 (9th Cir. 1990). In equal protection claims brought by a "class of one," the plaintiff must allege that he has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment. *See Sioux City Bridge Co. v. Dakota County,* 260 U.S. 441, 445 (1923); *Allegheny Pittsburgh Coal Co. v. Commission of Webster Cty.,* 488 U.S. 336 (1989).

Defendants argue that, because plaintiff's claims are based on his right to religious freedom, plaintiff must plead facts that show defendants invaded this fundamental right and that defendants' actions were not narrowly tailored to serve a compelling interest. Mot. at 11. Defendants contend that their actions were narrowly tailored to serve a compelling government interest, that is, compliance with the California Education and Penal Code. *Id.* In addition, defendants contend that there are no facts alleged indicating plaintiff received disparate treatment or was treated differently because of his religion. *Id.*

Plaintiff contends, in opposition, that the complaint clearly alleges defendants violated plaintiff's right to religious freedom by censoring his religious view that homosexuality is harmful while supporting the opposing viewpoint by others in sanctioning the "Day of Silence." Opp. at 17. Plaintiff points out that courts have found such disparate treatment violates equal protection guarantees. *Id.* (citing *Hansen v. Ann Arbor Public Schools,* 293 F.Supp.2d 780, 807 (E.D.Mich. 2003)). This Court's review of the allegations and facts presented contradicts both plaintiff's and defendants' interpretation of the claim.

The complaint alleges that "[u]nder the Policies, [d]efendants have allowed other students to wear homemade T-shirts, while suspending [plaintiff] for wearing his homemade T-shirt" thereby treating plaintiff "differently than other similarly-situated students, based on the content and viewpoint of his expression" and having "no compelling reason that would justify their disparate treatment of [plaintiff]." Compl. ¶¶ 99-101. The complaint also presents, as factual support for this claim, that Ron Harper was "told 'only positive community messages were allowed' and that shirts with negative messages were not allowed." Compl. ¶ 65. In viewing the allegations and facts presented, this Court cannot infer, as plaintiff suggests, that the complaint alleges plaintiff's religious viewpoint was censored. Plaintiff's equal protection claim speaks of plaintiff's "homemade T-shirt" and the supporting facts speak of "negative messages." Compl. ¶¶ 65, 99-101. This Court has found no allegation or fact indicating plaintiff's alleged disparate treatment was based on his religious viewpoint. Thus, based on the allegations and facts presented, viewed in the light most favorable to plaintiff, this Court finds plaintiff's equal protection claim is based on

censorship of plaintiff's negative message and noncensorship of positive messages. This Court finds nothing in the complaint that could infer the School's censorship of plaintiff's expression was based on his religious viewpoint.

Because there are no facts alleged that could be inferred to implicate plaintiff's fundamental rights based on religion nor any facts to indicate plaintiff belongs to a protected class, plaintiff's claim is treated as alleging a "class of one," requiring plaintiff to allege no rational basis for the difference in treatment. *See Sioux City Bridge Co.*, 260 U.S. at 445; *Allegheny Pittsburgh Coal Co.*, 488 U.S. 336.

The School's policies presented in the complaint clearly prohibit T-shirts bearing negative messages that "target[] members of a particular . . . sexual orientation." Compl., Exh. D; *see also id.* ¶ 69, Exh. B (prohibiting "derogatory connotations directed toward sexual identity."). The policies also state that these prohibitions are invoked in order "to promote harmonious human relationships that enable students to gain a true understanding of the rights and duties of people in our heterogenous society . . . , to promote the rights of equality and human dignity . . . , [and to] Foster[] positive attitudes and practices among students, staff and administration." *Id.*, Exh. D. The policies further explain that the expression of negative messages toward sexual orientation may cause "anxiety and lowered self-esteem [which could] impede learning." *Id.* This Court finds that the policies contained in the complaint clearly present a rational basis for the censorship of plaintiff's negative message.

Therefore, based on the facts and allegations presented, viewed in the light most favorable to plaintiff, it

appears beyond doubt that plaintiff can prove no set of facts that would entitle him to relief on his equal protection claim. *See Thompson,* 295 F.3d at 895; *Cahill,* 80 F.3d at 337-38. *Conley,* 355 U.S. at 45-46; *Navarro,* 250 F.3d at 732. Accordingly, defendants' motion to dismiss plaintiff's third cause of action for violation of his equal protection rights is GRANTED.

d. Fourth Cause of Action (Due Process)

The instant complaint sets forth three policies which plaintiff avers are relied upon by defendants as justification for their actions. First, plaintiff claims defendants rely upon the policy set forth in a student handbook entitled "Socially Responsible Behavior," which states, in pertinent part:

> C. Dress: School clothing should be neat, clean, and appropriate for school activities and should follow the standards of common decency. The dress code will be enforced at school-sponsored activities. Clothing that violates this standard is unacceptable, and the student in violation will be disciplined appropriately. Examples of unacceptable dress are as follows:
>
> . . .
>
> 3. Clothing and accessories (including backpacks) that promote or portray:
>
> . . .
>
> c. Violence or hate behavior including derogatory connotations directed toward sexual identity.

Compl. ¶ 69, Exh. B.

Second, plaintiff alleges defendants rely upon the Poway Unified School District's Board Policy, Article 5.0, Section 5.6, which provides, in part:

> Students attending schools within the District have the right to exercise free expression including, but not limited to, the use of bulletin boards, distribution of printed materials or petitions, and wearing buttons, badges and other insignia. The Board respects students' rights to express ideas and opinions, take stands, and support causes, whether controversial or not, through their speech, their writing, their clothing, and the printed materials they choose to post or distribute. . . .
>
> In the exercise of the student rights described above, no student shall distribute, materials, wear buttons or displays, or post notices or other materials which:
>
> 1. Are obscene to minors according to current legal definitions.
>
> 2. Are libelous or slanderous according to current legal definitions.
>
> 3. Incite students so as to create a clear and present danger of the imminent commission of unlawful acts on school premises or of the violation of lawful school regulations or of the substantial disruption of the orderly operation of the school.
>
> 4. Express or advocate racial, ethnic, or religious prejudice so as to create a clear and present danger of imminent commission of unlawful acts on school premises or of the violation of lawful school regulations or of the substantial disruption of the orderly operation of the school.

Compl. ¶ 72, Exh. C.

Finally, plaintiff alleges defendants rely on as justification for their actions, the following portion of the Board Policy, Article 5.0, Section 5.28.1, which states:

> In order to foster a supportive environment for a diverse student body, the Poway Unified School District provides guidelines to assist schools in the reduction and/or prevention of hate behavior.
>
> For the purpose of these guidelines the operational definition of hate behavior is as follows:
>
> A hate behavior is any act or attempted act to cause physical injury, emotional suffering, or property damage through intimidation, harassment, racial/ethnic slurs and bigoted epithets, vandalism, force or the threat of force, motivated all or in part by hostility to the victim's real or perceived gender, race, ethnicity, religion, sexual orientation, or mental or physical challenges . . .

Compl. ¶ 74; *see* Defts' Req. for Jud. Not., Exh. C.

Plaintiff's fourth cause of action alleges that defendants' "policies are vague and lack sufficient objective standards to curtail the discretion of school officials, which allows [d]efendants to enforce the policies in an ad hoc and discriminatory manner" in violation of due process. Compl. ¶ 104. Defendants contend that the policies at issue are not vague or ambiguous and, therefore, plaintiff's fourth cause of action must be dismissed. Mot. at 12.

A policy may be found void for vagueness if a reasonable person of ordinary intelligence could not understand what conduct is prohibited. *See Broadrick v. Oklahoma,* 413 U.S. 601, 608 (1973). Defendants argue that a reasonable student in plaintiff's position having read the School's policies, would understand that the language on his T-shirt was prohibited.

Mot. at 12. Defendants further argue that the policies present specific examples of prohibited behavior along with the guidelines presented by plaintiff. These examples, defendants point out, include an explanation "that hate behavior can be words considered offensive to persons of a specific sexual orientation" and "that hate behavior can consist of words where the bearer of the statement exalts his or her own classification while demeaning the victim group." *Id.* According to defendants, this case fits perfectly within the examples set forth in the Board Policy. *Id.* at 12-13.

Plaintiff, in opposition, contends that, because the policies require a subjective decision entirely within the discretion of the school officials, the policies "invite arbitrary and discriminatory enforcement by giving unbridled discretion to enforcement officials" which violates a "fundamental principle[] of due process." Opp. at 17-18 (citing *Grayned v. City of Rockford,* 408 U.S. 104, 109 (1972)).

The Supreme Court, in *Grayned,* found that a law which delegated "basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis" was impermissibly vague. 408 U.S. at 109. However, the enforcers of the statute at issue here are school officials, not policemen, judges, or juries as was the case in *Grayned.* School authorities are given much greater discretion in enforcing their rules. *See Hazelwood,* 484 U.S. at 266 ("A school need not tolerate student speech that is inconsistent with its 'basic educational mission,' even though the government could not censor similar speech outside the school."); *Fraser,* 478 U.S. at 686 ("Given the school's need to be able to impose disciplinary sanctions for a wide range of unanticipated conduct disruptive of the educational process . . . school disciplinary rules need not be as detailed as a criminal code which imposes criminal sanctions.").

The policies here clearly prohibit T-shirts bearing messages that are "derogatory connotations directed toward sexual identity." Compl. ¶ 69, Exh. B. The phrase "Homosexuality is shameful" is clearly derogatory toward sexual identity. Based solely on the policies detailed in the instant complaint, this Court finds that a reasonable student would know that the message on plaintiff's T-shirt was prohibited. Thus, this Court finds the School's policies are not vague or "lack sufficient objective standards to curtail the discretion of schoolofficials." *Id.* ¶ 104. Therefore, plaintiff's due process challenge fails as a matter of law. Accordingly, defendants' motion to dismiss plaintiff's fourth cause of action is GRANTED. Because the Court finds, as a matter of law, the policies at issue are not void for vagueness or impermissibly lack objective standards, plaintiff's due process challenge on this ground is DISMISSED WITH PREJUDICE.

e. Fifth Cause of Action (Establishment Clause)

Plaintiff's fifth cause of action alleges that defendants' policies, and the enforcement of those policies, are "hostile to religion," "treat[] [plaintiff] as a second-class citizen . . . because of his protected religious expression," and "allow district officials to approve one religious message over another and irreligion over religion," in violation of "the Establishment Clause of the First Amendment to the United States Constitution . . . as applied to the states under the Fourteenth Amendment." Compl. ¶¶ 108-111. Defendants contend plaintiff's claim fails as a matter of law and, therefore, must be dismissed. Mot. at 14-16.

The Establishment Clause of the First Amendment, made applicable to the states through the Fourteenth

Amendment, *Widmar v. Vincent,* 454 U.S. 263, 271 n.8 (1981), provides that "Congress shall make no law respecting an establishment of religion. . . . " U.S. Const. amend. I. This Clause, among other things, prohibits the government from preferring one religion over another. *Larson v. Valente,* 456 U.S. 228, 244 (1982) ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another."); *Mayweathers v. Newland,* 314 F.3d 1062, 1068 (9th Cir. 2002) ("The Establishment Clause of the First Amendment prohibits any government from enacting a law that would respect the establishment of religion."), *cert. denied sub. nom, Alameida v. Mayweathers,* 124 S.Ct. 66 (U.S. Oct. 6, 2003) (No. 02-1655).

> While this clause forbids Congress from advancing religion, the Supreme Court has interpreted it to allow, and sometimes to require, the accommodation of religious practices: "This Court has long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause." *Hobbie v. Unemployment Appeals Comm'n of Fla.,* 480 U.S. 136, 144-45, 107 S.Ct. 1046, 94 L.Ed.2d 190 (1987). Moreover, "in commanding neutrality the Religious Clauses do not require the government to be oblivious to impositions that legitimate exercises of state power may place on religious belief and practice." *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet,* 512 U.S. 687, 705, 114 S.Ct. 2481, 129 L.Ed.2d 546 (1994).

Mayweathers, 314 F.3d at 1068.

The three-part test developed in *Lemon v. Kurtzman* helps determine whether an accommodation statute

achieves this neutrality by avoiding "sponsorship, financial support, and active involvement of the sovereign in religious activity." *Id.* (citing *Lemon v. Kurtzman,* 403 U.S. 602, 612 (1971)). Under the *Lemon* test, a statute will survive an Establishment Clause attack if: (1) it has a secular legislative purpose, (2) its primary effect neither advances nor inhibits religion, and (3) it does not foster excessive government entanglement with religion. *Lemon,* 403 U.S. at 612-13; *Mayweathers,* 314 F.3d at 1068.

Defendants contend that the T-shirt's message worn by plaintiff was not prohibited, and plaintiff was not suspended, based on its religious content but, instead, on the fact that the "words as written . . . [were] directed towards a protected class, homosexuals, in an inflammatory way." Mot. at 15. Defendants note that there are no allegations the school informed plaintiff he could not wear religious shirts in general or shirts that bore a religious positive messages. *Id.* at 15-16. Defendants point out that, under the *Lemon* test, the school's actions meet the requirements, in that there is a secular purpose to curtail hurtful speech aimed at another race, gender or sexual orientation. This secular purpose, defendants contend, neither inhibits or endorses any particular religion, nor create any excessive government entanglement. *Id.* at 16.

Plaintiff contends that the deputy sheriffs and defendant Giles' statements were given to "coerce Chase Harper into changing his beliefs about homosexuality and warning others about its consequences" which violates the Establishment Clause. Opp. at 19. Plaintiff points out that the Ninth Circuit has determined that a teacher may not share his personal religious beliefs in school without running afoul of the Establishment Clause because student equate teachers' views with those of the school. *Id.*

According to plaintiff, a student who "equates the views of a teacher with the government, [will] surely do so when a vice principal or deputy sheriff assigned to the school speaks." *Id.* Thus, plaintiff contends that the statements made to plaintiff by the deputy sheriff and defendant Giles were intended to coerce plaintiff to change his religious views and are impermissible. *Id.*

This Court finds that the policies upon which the school authorities acted have a secular purpose: "promoting an environment that fosters positive attitudes and practices among students, staff and administration . . . includ[ing] . . . members of a particular . . . sexual orientation . . . " Compl., Exh. D. Thus, this Court agrees with defendants that the actions of the school officials in this case were consistent with the requirements under the *Lemon* test. As to whether the policies' primary effect neither advances nor inhibits religion, the facts and allegations contained in the complaint can be inferred to support either plaintiff's or defendants' version. The complaint avers that the deputy sheriff "*proposed* to [plaintiff] that as a member of the Christian faith, he *should* understand that Christianity was based on love not hate, and that [plaintiff] *should* not be offensive to others." Compl. ¶ 51 (emphasis added). Defendant Giles, similarly, merely "*advised* [plaintiff] that when he comes to Poway High, *if* his religious beliefs are offensive, he too must 'leave his faith in the car.'" *Id.* ¶ 57 (emphasis added). Plaintiff's deliberate use of the words "proposed," "should," and "advised" signifies that the speaker did not specifically order plaintiff to cease and desist in expressing his religious views. In addition, the use of the word "if" signifies that the speaker left the decision as to whether to "leave his faith in the car" to plaintiff "if" it was plaintiff's belief

that the expressive message would be offensive. *See id.* ¶ 57. Based on the facts and allegations presented in the instant complaint, and all inferences drawn from those facts, viewed in the light most favorable to plaintiff, this Court finds that it does not appear beyond doubt that plaintiff can prove no set of facts that may entitle him to relief. *Thompson,* 295 F.3d at 895; *Cahill,* 80 F.3d at 337-38; *Conley,* 355 U.S. at 45-46; *Navarro,* 250 F.3d at 732.

Therefore, this Court finds that plaintiff has sufficiently stated a claim under the Establishment Clause upon which relief may be granted. Accordingly, defendants' motion to dismiss plaintiff's fifth cause of action under the Establishment Cause is DENIED.

f. Sixth Cause of Action (Cal.Civ.Code § 52.1)

Plaintiff's sixth cause of action alleges that defendants "interfered or attempted to interfere with [p]laintiff's constitutional rights by the use of threats, intimidation, and/or coercion, in that defendants threatened expulsion, suspension and/or other discipline and engaged in intimidation and coercive tactics to compel [p]laintiff to forgo his constitutional rights" in violation of California Civil Code § 52.1. Compl. ¶¶ 113, 116. Defendant contend that plaintiff fails to state a claim upon which relief may be granted on this claim. Specifically, defendants argue that the claim fails as a matter of law because there are "no allegation[s] that there were any threats, intimidation or coercion." Mot. at 16.

In opposition, plaintiff points out that the complaint "clearly alleges violations to [plaintiff's] First Amendment liberties . . . in causes of action one through six . . . [and]

that '[p]laintiff was suspended from classroom instruction, detained in a small office for most of the school day, interrogated by a deputy sheriff, counseled by numerous school district officials, and in the end, told to leave his faith in the car.'" Opp. at 20 (quoting Compl. ¶ 114). Plaintiff further points out that the complaint states that plaintiff was threatened with "'expulsion, suspension and/or discipline'" if he did not remove his T-shirt. *Id.* (quoting Compl. ¶¶ 36-38). Plaintiff claims that the complaint also contains facts that "generally and implicitly" allege Plaintiff "was the victim of numerous acts of attempted intimidation and coercion by school officials." *Id.* (citing Compl. ¶¶ 36-38, 41-44, 47-52, 55-57, and 113).

Defendants, in reply, reiterate that there are "no allegation[s] of threats, intimidation or coercion" as required to maintain an action under California Civil Code § 52.1. Reply at 6. In addition, defendants contend that the claim is based upon the same constitutional rights as plaintiff's Section 1983 claim and, therefore, is redundant. *Id.* Finally, defendants contend that any constitutional claims are barred under this code section if they are barred under Section 1983. *Id.*

Defendants cite no authority for the proposition that redundant claims cannot proceed under both Section 1983 and California Civil Code § 52.1 and this Court has found no such authority. However, this Court finds that any constitutional claim found improper under Section 1983 cannot proceed before this Court under the California Civil Code. Accordingly, defendants' motion to dismiss plaintiff's sixth cause of action pursuant to California Civil Code 52.1 is GRANTED as to plaintiff's constitutional claims dismissed herein and DENIED as to those claims that remain.

2. Eleventh Amendment Immunity

Defendants also contend that plaintiff's damages claims are barred by the Eleventh Amendment to the United States Constitution. Mot. at 17 (citing *Edelman v. Jordan,* 415 U.S. 651 (1974); *Seminole Tribe v. Florida,* 517 U.S. 44 (1996)). Plaintiff, in opposition, concedes that the Eleventh Amendment bars plaintiff's request for damages as to the Poway Unified School District and the individual defendants in their official capacities. *See* Opp. at 23-24.

a. Poway Unified School District

The Eleventh Amendment prohibits suits against a state, and section 1983 does not abrogate this immunity since a state is not a "person" for purposes of the statute.[8] *Will v. Michigan Dept of State Police,* 491 U.S. 58, 62 (1989). As an "arm" of the state, the Poway Unified School District itself is shielded from liability under the Eleventh Amendment. *Id.* at 70; *Belanger v. Madera Unified School District,* 963 F.2d 248, 251 (9th Cir. 1992) (California school districts are considered to be state agencies for immunity purposes); *Mitchell v. Angeles Community College Dist.*, 861 F.2d 198, 201 (9th Cir. 1988). "[I]n the absence of consent a suit in which the State or one of its

[8] 42 U.S.C. § 1983 provides that "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

agencies or department is named as the defendant is proscribed by the Eleventh Amendment. This jurisdictional bar applies regardless of the nature of the relief sought." *Pennhurst v. Halderman,* 465 U.S. 89, 100 (1984) (citations omitted). Therefore, plaintiff's damages claims against the Poway Unified School District, undisputably a department of the state, are prohibited by the Eleventh Amendment even though he seeks prospective relief. The state has not consented to be sued under section 1983 and Congress did not override states' sovereign immunity when it enacted section 1983. *Will,* 491 U.S. at 67; *Southern Pacific Transp. Co. v. City of Los Angeles,* 922 F.2d 498 (9th Cir. 1990). Accordingly, defendants' motion to dismiss plaintiff's damages claim against the Poway Unified School District is GRANTED.

b. Individual Defendants in Their Official Capacities

The Eleventh Amendment also prohibits damage actions against state officials acting in their official capacities. *Will v. Michigan Dept. of State Police,* 491 U.S. 58, 71 n.10 (1989). However, the Eleventh Amendment "does not bar actions against state officers in their official capacities if the plaintiffs seek only a declaratory judgment or injunctive relief." *Chaloux v. Killeen,* 886 F.2d 247, 252 (9th Cir. 1989) (internal quotations omitted); *Pennhurst,* 465 U.S. at 104-06. "It is well established that the Eleventh Amendment does not bar a federal court from granting prospective injunctive relief against an officer of the state who acts outside the bounds of his authority." *Porter v. Bd. of Trustees, Manhattan Beach Unified Sch. Dist.,* 307 F.3d 1064, 1074 (9th Cir. 2002) (quoting *Cerrato v. San Francisco Community College Dist.,* 126 F.3d 968, 973 (9th

Cir. 1994); *Ex parte Young,* 209 U.S. 123, 159-60 (1908)). Injunctive relief, however, is available only if there is a "real or immediate threat that the plaintiff will be wronged again." *City of Los Angeles v. Lyons,* 461 U.S. 95, 111 (1983).

There appears to be no disagreement that the Eleventh Amendment bars damages claims against the individual defendants in their official capacities. Therefore, defendants' motion to dismiss plaintiff's damages claims against the individual defendants in their official capacities is GRANTED. Insofar as defendants move to dismiss the damages claims against the individual defendants in their personal capacities, absent qualified immunity from suit, the motion is DENIED.

3. Qualified Immunity

Plaintiff also sues the individual defendants in their personal capacities. Individual defendants sued in their personal capacities *may* be liable for damages under Section 1983, if the doctrine of qualified immunity does not apply. *Price*, 928 F.2d at 828; *Cerrato,* 26 F.3d at 973 n.16. Defendants contend that the individual defendants are immune from suit under the doctrine of qualified immunity and, therefore, should be dismissed. Mot. at 19-21. The affirmative defense of "qualified immunity" protects "government officials . . . from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982). The entitlement to qualified immunity "is an immunity from suit rather than a mere defense to liability." *Mitchell v. Forsyth,* 472 U.S. 511, 526

(1985). This standard "'gives ample room for mistaken judgments' by protecting 'all but the plainly incompetent or those who knowingly violate the law.'" *Hunter v. Bryant,* 502 U.S. 224, 229 (1991) (per curiam) (quoting *Malley v. Briggs,* 475 U.S. 335, 343 (1986)); *Jeffers v. Gomez,* 267 F.3d 895, 909 (9th Cir. 2001); *Saucier v. Katz,* 533 U.S. 194, 205 (2001) ("The concern of the immunity inquiry is to acknowledge that reasonable mistakes can be made as to the legal constraints on particular police conduct."). Both the Supreme Court and the Ninth Circuit have consistently held that the doctrine of qualified immunity shields "'government officials performing discretionary functions . . . from liability for *civil damages . . .*'" *Lytle v. Wondrash,* 182 F.3d 1083, 1086 (9th Cir.1999) (quoting *Harlow,* 457 U.S. at 818) (emphasis added). Qualified immunity "does not bar actions for declaratory or injunctive relief." *Presbyterian Church (U.S.A.) v. United States,* 870 F.2d 518, 527 (9th Cir. 1989) (citing *Harlow,* 457 U.S. at 806); *Keenan v. Hall,* 83 F.3d 1083, 1093 (9th Cir. 1996) (citing *American Fire, Theft & Collision Managers, Inc. v. Gillespie,* 932 F.2d 816, 818 (9th Cir. 1991); *see also Wood v. Strickland,* 420 U.S. 308, 314 n.6 (1975) ("[I]mmunity from damages does not ordinarily bar equitable relief as well."). The Court notes that plaintiff is seeking declaratory and injunctive relief as well as damages. *See* Compl. at 17-18. Therefore, this Court limits its discussion and decision to plaintiff's damages claims.

a. Step One – Constitutional Violation

The required first step in a qualified immunity analysis is, "taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" *Saucier,* 533 U.S.

at 201; *Jackson v. City of Bremerton,* 268 F.3d 646, 650 (9th Cir. 2001); *Johnson v. County of Los Angeles,* 340 F.3d 787, 791 (9th Cir. 2003) (noting that because qualified immunity is "'an entitlement not to stand trial' . . . courts, not juries, [must] settle the ultimate questions of qualified immunity") (quoting *Mitchell,* 472 U.S. at 526). "If no constitutional right would have been violated were the allegations established, there is no necessity for further inquiries concerning qualified immunity." *Saucier,* 533 U.S. at 201; *Haynie v. County of Los Angeles,* 339 F.3d 1071, 1078 (9th Cir. 2003). For the reasons discussed above, the Court has found that plaintiff has alleged facts sufficient to survive a motion to dismiss his claims concerning violation of his religious and speech rights under the First Amendment. Even though his claims have yet to be tested on the merits, the Court assumes, for purposes of this motion, plaintiff's allegations survive the first prong of qualified immunity analysis.

b. Step Two – Clearly Established Law

The Court now must turn to the next step: whether "it would be clear to a reasonable officer that [t]his conduct was unlawful in the situation he confronted." *Saucier,* 533 U.S. at 202; *Wilkins v. City of Oakland,* 350 F.3d 949, 954 (9th Cir. 2003). Therefore, the Court must next decide whether the "contours" of the right are "'sufficiently clear that a reasonable official would understand that what he is doing violates that right.'" *Id.* (quoting *Anderson v. Creighton,* 483 U.S. 635, 640 (1987)).

The "clearly established" inquiry focuses on whether "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted," *see Saucier,*

533 U.S. at 202, or whether the state of the law gave "fair warning" to defendants that their decision to deny plaintiff his constitutional rights was unconstitutional. *Hope v. Pelzer,* 536 U.S. 730, 740 (2002). "This inquiry, it is vital to note, must be undertaken in light of the specific context of the case." *Saucier,* 533 U.S. at 201. Officials, however, "can still be on notice that their conduct violates established law, even in novel factual circumstances." *Hope,* 536 U.S. at 741. Specificity only requires that the unlawfulness be apparent under preexisting law. *Anderson v. Creighton,* 483 U.S. 635, 640 (1987).

Defendants contend that, even though it appears clear that plaintiff's T-shirt message would create a disruption at the School, it still remains to be seen whether "federal law will overcome the clear obligation of the School District staff to stop this speech against persons in a classification protected by the State of California." Mot. at 20-21. Defendants rely upon California's Education Code and Code of Regulations that provide definitions of "sexual harassment." *Id.* at 20.

Plaintiff, in opposition, contends that the school officials' reliance on California law in determining whether federal law would be violated by their actions is improper based on the Supremacy Clause, which requires the states to abide by federal law where the state law is conflicting. *See* Opp. at 21-22. Plaintiff argues that, even if defendants were obligated to abide by state law, "the law was just as clear in April 2004 as it is today – state law must give way to federal law." *Id.* at 22. Plaintiff also contends that plaintiff's speech was not prohibited under California's Education Code. *Id.*

Defendants, in reply, claim that plaintiff's argument is presented as if the state law has "already been declared to violate [plaintiff's] right to free speech." Reply at 8. Defendants assert that it is unclear whether plaintiff's "right to free speech and religion is overcome by the state statutes prohibiting sexual orientation harassment." *Id.* at 7.

This Court agrees with defendants. The school officials' actions fell well within the policies and law provided by the School District[9] and the Court cannot find that the alleged unlawfulness of the state laws and the School's policies was apparent under pre-existing law. *Anderson,* 483 U.S. at 640. This Court further finds that it was not sufficiently "clear to a reasonable officer that his conduct was unlawful in the situation he confronted," *see Saucier,* 533 U.S. at 202, or that the current state of the law gave defendants "fair warning" that their decision to deny plaintiff his constitutional rights was unconstitutional. *Hope,* 536 U.S. at 740. Therefore, the individual defendants are entitled to qualified immunity against plaintiff's damages claims in this case. Accordingly, defendants' motion to dismiss plaintiff's damages claims against the individual defendants based on qualified immunity is GRANTED.

II. Plaintiff's Motion for Preliminary Injunction

Having determined that plaintiff's claims based on his rights to freedom of speech and religion under the First Amendment and his right to equal protection of the law

[9] In addition, this Court notes it has determined, *supra,* the School's policies are not vague or impermissibly lacking in objective standards as a matter of law.

under the Fourteenth Amendment survives defendants' dismissal motion, this Court now turns to plaintiff's motion for preliminary injunction. Plaintiff seeks this Court's order enjoining defendants from enforcing their policies and practices.

A. Legal Standard

A party seeking injunctive relief under Federal Rule of Civil Procedure 65 must show either (1) a combination of probable success on the merits and the possibility of irreparable harm, or (2) that serious questions are raised and the balance of hardships tips sharply in the moving party's favor. *Sun Microsystems, Inc. v. Microsoft Corp.*, 188 F.3d 1115, 1119 (9th Cir. 1999); *Roe v. Anderson*, 134 F.3d 1400, 1402 (9th Cir. 1998). "'These two formulations represent two points on a sliding scale in which the required degree of irreparable harm increases as the probability of success decreases.'" *Roe*, 134 F.3d at 1402 (citing *United States v. Nutri-cology, Inc.*, 982 F.2d 394, 397 (9th On 1992)); *accord Sun Microsystems*, 188 F.3d at 1119. "Thus, 'the greater the relative hardship to the moving party, the less probability of success must be shown.'" *Sun Microsystems*, 188 F.3d at 1119 (quoting *National Ctr. for Immigrants Rights v. INS*, 743 F.2d 1365, 1369 (9th Cir. 1984)). "In cases where the public interest is involved, the district court must also examine whether the public interest favors the plaintiff." *Fund for Animals, Inc. v. Lujan*, 962 F.2d 1391, 1400 (9th Cir. 1992) (citing *Caribbean Marine Servs. Co. v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988)).

B. Analysis

This Court notes that all plaintiff needs to demonstrate irreparable harm in a First Amendment context is to show "the existence of a colorable First Amendment claim." *Sammartono v. First Judicial Court*, 303 F.3d 959, 973 (9th Cir. 2002). Therefore, because plaintiff's First Amendment challenges have survived defendants' motion to dismiss, this Court finds plaintiff's claims demonstrate irreparable harm for purposes of the instant motion for preliminary injunction. Accordingly, this Court confines its discussion to whether plaintiff has demonstrated a likelihood of success on the merits of his claims and whether the balance of hardships tip sharply in his favor.

1. Likelihood of Success on the Merits

Plaintiff contends that there is a high probability he will succeed on the merits of his claims. Defendants disagree. This Court, after a thorough review of the pleadings, declarations, and relevant exhibits submitted by the parties, finds that plaintiff has failed to demonstrate he will succeed on the merits of his claims. As discussed previously, on motion to dismiss, this Court must view all facts and allegations in the light most favorable to plaintiff and construe all inferences drawn from the facts in that same light. *See Thompson,* 295 F.3d at 895; *Cahill,* 80 F.3d at 337-38. This Court is further confined, on motion to dismiss, to the four corners of the complaint and may not review extrinsic evidence in making its determination. *See Parrino,* 146 F.3d at 705-06; *Lee,* 250 F.3d at 688-89. Those restrictions are not required on consideration of a motion for preliminary injunction; a preliminary injunction motion can be granted on affidavits. *See Flynt Distributing Co. v. Harvey,* 734 F.2d 1389,

1394 (9th Cir.1984); *see also National Organization for Reform of Marijuana Law v. Mullen,* 608 F.Supp. 945 (D.C. Cal. 1985). The Court "may give even inadmissible evidence some weight, when to do so serves the purpose of preventing irreparable harm before trial." *Flynt,* 734 F.2d at 1394. The record presented by the parties, including the declarations submitted by defendants, persuade this Court that plaintiff will not succeed on the merits of his claims that have survived defendants' challenge on motion to dismiss.

Three of plaintiff's constitutional claims have survived defendants' motion to dismiss: (1) the violation of plaintiff's right to free speech; (2) the violation of plaintiff's right to free exercise of religion; and (3) the violation of plaintiff's rights under the Establishment Clause. The Court addresses each of the remaining claims in turn.

a. Freedom of Speech Claim

Defendants have not provided any additional evidence to aid this Court's determination of whether the speech at issue is "plainly offensive" thereby rendering the speech suppressible under *Fraser.* However, student speech will not offend the Constitution's free speech prohibitions if it "materially disrupts classwork or involves substantial disorder or invasion of the rights of others." *Tinker,* 393 U.S. at 513. "*Tinker* does not require certainty that disruption will occur, 'but rather the existence of facts which might reasonably lead school officials to forecast substantial disruption.'" *LaVine,* 257 F.3d at 989 (quoting *Tinker,* 393 U.S. at 514). Thus, a showing that the suppressed speech might reasonably be forecasted as a material disruption at school negates plaintiff's claims.

Defendants have presented such a showing. The declaration of Lynell Antrim, Assistant Principal, indicates that the previous year's "Day of Silence" conducted at the school had resulted in "volatile behavior," including altercations between students. Antrim Decl. ¶ 2. David LeMaster, a History and English teacher at the School, testifies in his declaration that he observed a disruption in the class that plaintiff attended while wearing the T-shirt at issue here. LeMaster Decl. ¶ 3. LeMaster also stated that he recalled that the events from the previous year's "Day of Silence" had resulted in "tensions between students." *Id.* ¶ 4. Scott Fisher, Principal at the School, stated that plaintiff told him a "tense verbal conversation with a group of students" had already taken place due to the T-shirt's message and was mindful of altercations that had occurred during the previous year's "Day of Silence." Fisher Decl. ¶¶ 3, 8.

This evidence, along with the allegations contained in the complaint espousing the concerns of Principal Giles, Assistant Principal Antrim and the deputy sheriff, and reciting the school policies, is sufficient, in this Court's view, to permit that the school officials to "reasonably . . . forecast substantial disruption of or material interference with school activities." *Tinker,* 393 U.S. at 514. Therefore, this Court finds that plaintiff has failed to demonstrate a likelihood of success on the merits of his free speech claim.

b. Free Exercise Claim

Plaintiff bases his free exercise claim, in part, on it being a "hybrid" claim which requires strict scrutiny analysis. *See Smith,* 494 U.S. at 881; *Swanson,* 135 F.3d at 700. As plaintiff correctly points out, without the free

speech claim, plaintiff's free exercise claim does not require strict scrutiny. *See Smith,* 494 U.S. at 878. Plaintiff concedes that the School's prohibition on speech is "arguably" a neutral law requiring scrutiny pursuant to a rational basis test. *See* Pltff's Opp. to Mot. to Dism. at 15. This Court finds the School's policies are clearly based on a legitimate pedagogical concern – avoidance of disruption based on intolerance of others – which provides a rational basis for the School's suppression of plaintiff's expression. *See Tinker,* 393 U.S. at 514. Plaintiff's right to free exercise does not relieve him of his obligation to comply with valid and neutral policies having general application to all students. *Smith,* 484 U.S. at 879. Therefore, in light of the allegations in the complaint and the evidence presented in defendants' declarations, as detailed above, this Court finds that, without the free speech claim, plaintiff has failed to demonstrate that defendants' actions were irrational or wholly arbitrary. Accordingly, plaintiff has failed to demonstrate a likelihood of success on the merits of his free exercise claim.

c. Establishment Clause Claim

Plaintiff's Establishment Clause claim is similarly devoid of support. Plaintiff alleges that the statements made by the deputy sheriff and defendant Giles were attempts by school authorities to coerce plaintiff to change his religious views. *See* Compl. ¶ 51, 57, 108-110; Mot. at 17-18. This Court denied defendants' motion to dismiss this claim because the allegations could possibly be proven. However, this Court's decision rested on the fact that, on motion to dismiss, the facts and allegations, along with all inferences construed from those facts, must be viewed in the light most favorable to plaintiff. The requirement of

deference to plaintiff's allegations is not present in determining whether plaintiff can demonstrate a likelihood of success on the merits. From the standpoint of plaintiff's motion for injunctive relief, the Court finds it unlikely that the statements in the complaint relating to Giles and the deputy sheriff were given to coerce plaintiff into changing his religious beliefs. As previously stated, the complaint avers that the deputy sheriff "*proposed* to [plaintiff] that as a member of the Christian faith, he *should* understand that Christianity was based on love not hate, and that [plaintiff] *should* not be offensive to others." Compl. ¶ 51 (emphasis added). Defendant Giles, similarly, merely "*advised* [plaintiff] that when he comes to Poway High, *if* his religious beliefs are offensive, he too must 'leave his faith in the car.'" *Id.* ¶ 57 (emphasis added). Plaintiff's deliberate use of the words "proposed," "should," and "advised" signifies that the speaker did not specifically order plaintiff to cease and desist in expressing his religious views. Further, the use of the word "if" signifies that the speaker left the decision as to whether to "leave his faith in the car" to Plaintiff "if" it was plaintiff's belief that the expressive message would be offensive. *See id.* ¶ 57. This Court finds it unlikely that the statements alleged to be made by the school officials could be proven to be attempts to coerce plaintiff to change his religious views. It appears more reasonable that the trier of fact would infer that the officials' statements relied upon by plaintiff to depict coercion were no more than options presented to and left with plaintiff.

In addition, the policies and statements made had a secular purpose, *i.e.*, promoting tolerance, and not advancing or inhibiting religion. Moreover, there are no facts to suggest that defendants approved one religious message

over another or approved "irreligion over religion." Compl. ¶ 111. Indeed, plaintiff has not presented any further evidence to persuade this Court that the claim will succeed. Therefore, this Court finds that plaintiff has failed to demonstrate a likelihood of success on the merits of his Establishment Clause claim.

2. Balance of Hardships

In determining whether the balance of hardships tip sharply in plaintiff's favor, plaintiffs "sincerely held religious beliefs" regarding the Biblical condemnation of homosexual behavior and his assertion that the First Amendment permits him to express his beliefs in a school setting must be balanced against the School's responsibility to act *in loco parentis* on behalf of the students, promote tolerance, and protect the rights of other students. *See Sun Microsystems,* 188 F.3d at 1119. The Supreme Court has recognized that school officials have a responsibility to discipline students where there "is reason to believe the student's expression "intrudes upon the work of the schools or on the rights of other students. *Tinker,* 393 U.S. at 508. School officials are in a better position, based upon their familiarity with the pulse and culture of the school setting, to decide whether restrictions on expression are appropriate. *See Chandler,* 978 F.2d at 527. Here, the School's policies implement State of California rules to prohibit discrimination, intimidation, harassment and hate based upon, among other classifications, sexual orientation. This Court notes that there is nothing in the record to suggest plaintiff would not be free to proselytize any religious view or any other viewpoint in a manner that does not violate neutral and valid school policies. On the other hand, requiring the School to allow plaintiff to

express this particular viewpoint could result in disruption of the work of the schools or the violation of the rights of other students.

Defendants, in their opposition, contend that the public interest would not be served by allowing plaintiff's expression in school. *See* Opp. at 22-23 (citing *Sammartino v. First Judicial District Court,* 303 F.3d 959, 974 (9th Cir. 2002) (where First Amendment rights are concerned, the public's interest may still outweigh the moving party's interest, especially in a school setting)). Defendants point out that the School has an obligation to keep their students "safe regardless of sexual orientation." Opp. at 22. According to defendants, "the safety and well-being of gay and lesbian students, and the ability of school administrators to regulate anti-gay speech, outweighs [p]laintiff's competing interest." *Id.* This Court agrees with defendants. Moreover, in this Court's view, balancing the needs of the School to keep all their students safe coupled with the foreseeable vision that other students may feel free to exhibit these types of expressions that would interfere with the work of the school and violate the rights of others against plaintiff's interests does not tip the scales sharply in plaintiff's favor.

C. Conclusion

Because this Court finds that plaintiff has failed to demonstrate a likelihood of success on the merits of any of the claims that survived defendants' motion to dismiss and that the balance of hardships do not tip sharply in plaintiff's favor, plaintiff's motion for preliminary injunction is DENIED.

ORDER

For the reasons set forth above, IT IS HEREBY ORDERED that:

1. Defendants' motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6) [doc. # 14] is **GRANTED IN PART** and **DENIED IN PART** as follows:

   a. Defendants' motion to dismiss plaintiff's first cause of action is **DENIED**;

   b. Defendants' motion to dismiss plaintiff's second cause of action is **DENIED**;

   c. Defendants' motion to dismiss plaintiff's third cause of action is **GRANTED**; plaintiff's third cause of action is **DISMISSED without prejudice**;

   d. Defendants' motion to dismiss plaintiff's fourth cause of action is **GRANTED**; plaintiff's fourth cause of action is **DISMISSED with prejudice**;

   e. Defendants' motion to dismiss plaintiff's fifth cause of action is **DENIED**;

   f. Defendants' motion to dismiss plaintiff's sixth cause of action pursuant to California Civil Code 52.1 is **GRANTED** as it relates to plaintiff's third and fourth causes of action and **DENIED** as it relates to the remaining claims;

   g. Defendants' motion to dismiss plaintiff's damages claims as to defendant Poway Unified School District and the individual defendants in then official capacities based on Eleventh Amendment immunity is **GRANTED**; and

h. Defendants' motion to dismiss plaintiff's damages claims as to the individual defendants in their personal capacities based on qualified immunity is **GRANTED**.

2. Plaintiff's motion for preliminary injunction [doc. # 18] is **DENIED**.

3. Defendants shall file an answer or otherwise respond to the complaint **no later than December 3, 2004**.

Dated: November 4, 2004

/s/ John A. Houston
JOHN A. HOUSTON
United States District Judge

cc: Magistrate Judge Porter
All Counsel of Record

APPENDIX E

MINUTES OF THE UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF CALIFORNIA

Case: *Harper v. Poway* Case No.: 04cv1103 JAH (POR)

HON. John A. Houston Rptr. ___

CT. DEPUTY Larry McDowell

Present

Plaintiff(s): n/a

Defendant(s): n/a

The hearing on plaintiff's motion for reconsideration set for August 3, 2006 is VACATED. The motion is taken under submission without oral argument. Court to issue order. Parties notified by telephone.

DATE: 7/28/06 INITIALS: LM Deputy

cc: Magistrate Judge Porter

APPENDIX F

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TYLER CHASE HARPER, a minor, by and through his parents Ron and Cheryl Harper; RON HARPER; CHERYL HARPER; KESLIE K. HARPERE, a minor, by and through his parents Ron and Cheryl Harper,

Plaintiffs-Appellants,

v.

POWAY UNIFIED SCHOOL DISTRICT; JEFF MANGUM; LINDA VANDERVEEN; PENNY RANFTYLE; STEVE MCMILLAN; ANDY PATAPOW, All Individually and in their official capacity as Members of the Board of the Poway Unified School District; DONALD A. PHILLIPS, Individually, and in his official capacity as Superintendent of the Poway Unified School District; SCOTT FISHER, Individually and in his official capacity as Principal of Poway High School; LYNELL ANTRIM, Individually and in her official capacity as Assistant Principal of Poway High School; ED GILES, Individually and in his official capacity as Vice Principal of Poway High School; DAVID LEMASTER, Individually and in

No. 04-57037

D.C. No. CV-04-01103-JAH Southern District of California, San Diego

ORDER

(Filed Jul. 31, 2006)

his official capacity as Teacher of Poway High School; DOES 1 THROUGH 20, INCLUSIVE,

Defendants-Appellees.

Before REINHARDT, KOZINSKI, and THOMAS, Circuit Judges.

Request for vacatur is denied because, among other reasons, co-plaintiff seeks identical injunctive relief on identical grounds. Although it was unnecessary to resolve any question of the co-plaintiff's standing when deciding the merits of the appeal, *see Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166, 1173 n.9 (9th Cir. 2006), a review of the district court record, including the amended complaints, demonstrates that the co-plaintiff has standing to pursue the same claims for the same relief. We also note that Harper's damages claim remains alive.

APPENDIX G

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TYLER CHASE HARPER, a minor, by and through his parents Ron and Cheryl Harper; RON HARPER; CHERYL HARPER, KESLIE K. HARPERE, a minor, by and through his parents Ron and Cheryl Harper,

Plaintiffs-Appellants,

v.

POWAY UNIFIED SCHOOL DISTRICT; JEFF MANGUM; LINDA VANDERVEEN; PENNY RANFTYLE; STEVE MCMILLAN; ANDY PATAPOW, All Individually and in their official capacity as Members of the Board of the Poway Unified School District; DONALD A. PHILLIPS, Individually, and in his official capacity as Superintendent of the Poway Unified School District; SCOTT FISHER, Individually and in his official capacity as Principal of Poway High School; LYNELL ANTRIM, Individually and in her official capacity as Assistant Principal of Poway High School; ED GILES, Individually and in his official capacity as Vice Principal of Poway High School; DAVID LEMASTER, Individually and in his official capacity as Teacher of Poway

No. 04-57037

D.C. No.
CV-04-01103-JAH
Southern District
of California,
San Diego

ORDER

High School; DOES 1 THROUGH 20, INCLUSIVE,

Defendants-Appellees.

Filed July 31, 2006

Before: Stephen Reinhardt, Alex Kozinski, and Sidney R. Thomas, Circuit Judges.

Order;
Concurrence by Judge Reinhardt;
Concurrence by Judge Gould;
Dissent by Judge O'Scannlain

ORDER

A judge requested a vote on whether to rehear this matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. Fed. R. App. P. 35. The request for rehearing en banc is denied.

REINHARDT, Circuit Judge, concurring in the order denying the petition for rehearing en banc:

The dissenters still don't get the message – or *Tinker!* Advising a young high school or grade school student while he is in class that he and other gays and lesbians are shameful, and that God disapproves of him, is not simply "unpleasant and offensive." It strikes at the very core of the young student's dignity and self-worth. Similarly, the example Judge Kozinski offers, a T-shirt bearing the message, "Hitler Had the Right Idea" on one side and "Let's Finish the Job!" on the other, serves to intimidate and injure young Jewish students in the same way, as

would T-shirts worn by groups of white students bearing the message "Hide Your Sisters – The Blacks Are Coming." Under the dissent's view, large numbers of majority students could wear such shirts to class on a daily basis, at least until the time minority members chose to fight back physically and disrupt the school's normal educational process. *Tinker v. Des Moines Indep. Sch. Dist.,* 393 U.S. 503, 513 (1969).

Perhaps some of us are unaware of, or have forgotten, what it is like to be young, belong to a small minority group, and be subjected to verbal assaults and opprobrium while trying to get an education in a public school, or perhaps some are simply insensitive to the injury that public scorn and ridicule can cause young minority students. Or maybe some simply find it difficult to comprehend the extent of the injury attacks such as Harper's cause gay students. Whatever the reason for the dissenters' blindness, it is surely not beyond the authority of local school boards to attempt to protect young minority students against verbal persecution, and the exercise of that authority by school boards is surely consistent with *Tinker*'s protection of the right of individual students "to be secure and to be let alone." *Tinker,* 393 U.S. at 508.

GOULD, Circuit Judge, concurring in the order denying the petition for rehearing en banc:

Hate speech, whether in the form of a burning cross, or in the form of a call for genocide, or in the form of a tee shirt misusing biblical text to hold gay students to scorn, need not under Supreme Court decisions be given the full protection of the First Amendment in the context of the

school environment, where administrators have a duty to protect students from physical or psychological harms.

O'SCANNLAIN, Circuit Judge, with whom KLEINFELD, TALLMAN, BYBEE, and BEA, Circuit Judges, join, dissenting from denial of rehearing en banc:

Judge Kozinski's powerful dissent explains why the court errs in permitting school administrators to engage in viewpoint discrimination on the basis of a student's newly promulgated right to be free from certain offensive speech. I write only to emphasize why it was a mistake to fail to rehear this case en banc.

I

The Supreme Court has clearly stated that

> [i]n order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.

Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 509 (1969). Tyler Harper wore a T-shirt to his high school with the words "Be Ashamed, Our School Embraced What God Has Condemned" on the front and "Homosexuality Is Shameful 'Romans 1:27'" on the back. *Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166, 1171 (9th Cir. 2006). Harper's shirt was undoubtedly unpleasant and offensive to some students, but *Tinker* does not permit school administrators to ban speech on the basis of "a mere desire

to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." 393 U.S. at 509.

Nevertheless, the panel majority stretches mightily to characterize Harper's message as a psychological attack that might "cause young people to question their self-worth and their rightful place in society." *Harper,* 445 F.3d at 1178. According to the panel majority, a student's "right to be let alone" now includes a right to be free from "verbal assaults on the basis of a core identifying characteristic such as race, religion, or sexual orientation." *Id.* But if displaying a distasteful opinion on a T-shirt qualifies as a psychological or verbal assault, school administrators have virtually unfettered discretion to ban any student speech they deem offensive or intolerant.

In my view, this unprecedented – and unsupportable – expansion of the right to be let alone as including a right not to be offended has no basis in *Tinker* or its progeny, and we neglect our duty by failing to reexamine the majority's decision.

II

In reality, the panel majority's decision amounts to approval of blatant viewpoint discrimination. Harper wore his T-shirt after students involved in the Gay-Straight Alliance organized a "Day of Silence" in support of those of a different sexual orientation. School administrators permitted the "Day of Silence" but prohibited Harper from offering a different view-a decision now upheld by this court.

Such action is directly contrary to the "prohibition on viewpoint discrimination [that] serves . . . to bar the government from skewing public debate." *Rosenberger v.*

Rector & Visitors of Univ. of Va., 515 U.S. 819, 894 (1995). We normally subject this type of viewpoint discrimination "to the most exacting First Amendment scrutiny," *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 207 (3d Cir. 2001), because it "suggests an attempt to give one side of a debatable public question an advantage in expressing its views," *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 785 (1978). The panel majority failed to do so in this case.

Instead, under the panel majority's decision, school administrators are now free to give one side of debatable public questions a free pass while muzzling voices raised in opposition. A respected First Amendment scholar notes that the panel majority's decision constitutes

> a dangerous retreat from our tradition that the First Amendment is viewpoint-neutral. It's an opening to a First Amendment limited by rights to be free from offensive viewpoints. It's a tool for suppression of one side of public debates (about same-sex marriage, about Islam, quite likely about illegal immigration, and more) while the other side remains constitutionally protected and even encouraged by the government.

Eugene Volokh, *Sorry, Your Viewpoint Is Excluded from First Amendment Protection*, April 20, 2006, http://volokh.com/posts/1145577196.shtml. No Supreme Court decision empowers our public schools to engage in such censorship nor has gone so far in favoring one viewpoint over another.

III

I regret that we have failed to avail ourselves of the opportunity to reconsider a decision that departs so sharply from long-accepted First Amendment principles. I

therefore respectfully dissent from our order denying rehearing en banc.

APPENDIX H

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Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

TYLER CHASE HARPER, and KELSIE K. HARPER, minors, by and through their parents RON and CHERYL HARPER,

Plaintiffs,

v.

POWAY UNIFIED SCHOOL DISTRICT; JEFF MANGUM, LINDA VANDERVEEN, PENNY RANFTLE, STEVE MCMILLAN, and ANDY PATAPOW, all individually and in their official capacity as Members of the Board of the Poway Unified School District; DR. DONALD A. PHILLIPS, individually, and in his official capacity as Superintendent of the Poway Unified School District; SCOTT FISHER, individually and in his official capacity as Principal of Poway High School; LYNELL ANTRIM, individually and in her official capacity as Assistant Principal of Poway High School; ED GILES, individually and in his official capacity as Vice Principal of Poway High School; DAVID LEMASTER, individually and in his official capacity as Teacher of Poway High School; DOES 1 through 20, inclusive,

Defendants.

CASE NO.
CV041103 JAH (POR)

SECOND AMENDED VERIFIED COMPLAINT AND DEMAND FOR JURY TRIAL

Nature of Action: Civil Rights Suit Under 42 U.S.C. § 1983

I.

INTRODUCTION

1. This is a case to vindicate the First Amendment rights of Plaintiffs Tyler Chase Harper ("Chase") and Kelsie K. Harper, two high school students attending Poway High School. Chase Harper used a T-shirt message to express his sincerely-held religious beliefs among his public high school classmates in response to an event known as the "Day of Silence." This event was sponsored by Poway High School and its Gay-Straight Alliance student club. Because Plaintiff Chase Harper refused to compromise his religious beliefs and his First Amendment rights, he was suspended from school for simply continuing to wear a homemade message on his T-shirt. Additionally, Plaintiff Kelsie Harper and other similarly situated students are barred by school policies from engaging in the same or similar conduct, which is protected by the First Amendment. The arbitrary suspension of Chase Harper, the policies of the school district, and the unambiguous threat of further punishment by school district personnel against Plaintiffs and other students who plan to engage in similar protected conduct in the future have violated their rights to freedom of speech, to the free exercise of their religion, due process, and to the equal protection of the law guaranteed to Plaintiffs and other students by the First and Fourteenth Amendments to the United States Constitution and the California Education Code.

II.

JURISDICTION AND VENUE

2. This action arises under the First and Fourteenth Amendments to the United States Constitution, the Civil

Rights Act (42 U.S.C. §§ 1983 and 1985), California Civil Code § 52.1, and California Education Code §§ 48907 and 48950.

3. This Court has jurisdiction over this case pursuant to 28 U.S.C. §§ 1331 and 1343, this being a suit in equity authorized by law to be brought to redress the deprivation, under color of law, statute, regulation, or custom and usage of the State of California of rights, privileges and immunities secured by the laws and Constitution of the United States; particularly the First and Fourteenth Amendments of the Constitution of the United States pursuant to 42 U.S.C. § 1983. The Court has supplemental jurisdiction over this case pursuant to 28 U.S.C. § 1367(a).

4. Venue is proper in the Southern District of California under 28 U.S.C. § 1391(b), because a substantial part of the actions or omissions giving rise to this case occurred within the Southern District of California.

5. This Court is authorized to grant the relief requested under 28 U.S.C. §§ 2201-02 and Rule 65 of the Federal Rules of Civil Procedure for the purpose of determining a question and actual controversy between the parties, to wit: whether the silencing by punishment, physical restraint and intimidation via threat of further punishment constitutes a denial to Plaintiffs of freedom of religion and speech guaranteed under the First Amendment to the United States Constitution and applicable to the state under the Due Process Clause of the Fourteenth Amendment to the United States Constitution and the laws of the United States.

6. This Court is authorized to grant Plaintiffs' prayer for relief regarding costs, including reasonable attorneys' fees, pursuant to 42 U.S.C. § 1988.

III.

IDENTIFICATION OF THE PARTIES

7. Plaintiff TYLER CHASE HARPER ("Chase Harper" or "Chase"), a minor, is and was at all times relevant to this Complaint a student at Poway High School and a resident of Poway, California.

8. Plaintiff KELSIE K. HARPER ("Kelsie Harper" or "Kelsie"), a minor, is a student at Poway High School and a resident of Poway, California.

9. Plaintiffs RON and CHERYL HARPER are the parents of Tyler Chase Harper and Kelsie K. Harper who presently reside in Poway, California.

10. Defendant POWAY UNIFIED SCHOOL DISTRICT is a public entity established, organized, and authorized under and pursuant to the laws of California with the authority to sue and be sued in its own name.

11. Defendant JEFF MANGUM, at all times relevant herein, was a board member of the Poway Unified School District. This defendant is sued both individually and in his official capacity.

12. Defendant LINDA VANDERVEEN, at all times relevant herein, was a board member of the Poway Unified School District. This defendant is sued both individually and in her official capacity.

13. Defendant PENNY RANFTLE, at all times relevant herein, was a board member of the Poway Unified School District. This defendant is sued both individually and in her official capacity.

14. Defendant STEVE MCMILLAN, at all times relevant herein, was a board member of the Poway Unified School District. This defendant is sued both individually and in his official capacity.

15. Defendant ANDY PATAPOW, at all times relevant herein, was a board member of the Poway Unified School District. This defendant is sued both individually and in his official capacity.

16. Defendant DR. DONALD A. PHILLIPS, at all times relevant herein, was the Superintendent of Poway Unified School District. This Defendant is sued both individually and in his official capacity.

17. Defendant SCOTT FISHER, at all times relevant herein, was the Principal of Poway High School. This Defendant is sued both individually and in his official capacity.

18. Defendant LYNELL ANTRIM, at all times relevant herein, was an Assistant Principal of Poway High School. This Defendant is sued both individually and in her official capacity.

19. Defendant ED GILES, at all times relevant herein, was an Assistant Principal of Poway High School. This Defendant is sued both individually and in his official capacity.

20. Defendant DAVID LEMASTER, at all times relevant herein, was an instructor at Poway High School.

This Defendant is sued both individually and in his official capacity.

21. Doe Defendants 1 through 20 are unknown to Plaintiffs at this time but each is to be identified in this case as a resident of the State of California and acting in all particulars material to this case in his or her official capacity and under color of state law.

IV.

STATEMENT OF FACTS

22. Chase Harper and Kelsie K. Harper (collectively referred to as "Plaintiffs") are seventeen and fifteen years old respectively. Both are currently enrolled at Poway High School ("School") in the Poway Unified School District.

23. Plaintiffs are Christians with sincerely-held religious beliefs regarding Biblical teachings on homosexual behavior.

24. Plaintiffs believe, among other things, that a loving God condemns behavior that is destructive to humankind, the principal object of His love, and that homosexual behavior is immoral, damaging to the practitioners and to human society in general, and is demonstrably contrary to the teachings of the Bible, which they believe is the inspired Word of God.

25. Plaintiffs are informed and believe that the true purpose of the programs and events sponsored by Poway High School on April 21, 2004 and at various other times are to endorse, promote, and encourage homosexual behavior.

26. Plaintiffs' sincerely-held religious beliefs compel them to communicate, out of a sense of compassionate duty, the Biblical condemnation of homosexual behavior to others in their school and their community.

27. In the days and weeks prior to April 21, 2004, Chase became aware that a "Day of Silence" would be observed, endorsed, encouraged, subsidized, and promoted at Poway High School on April 21, 2004.

28. Plaintiffs have learned that the "Day of Silence" was organized to encourage students and other individuals to refrain from speaking during the school day, even when called-on by teachers, in order to demonstrate support for individuals engaged in overt homosexual lifestyles and behavior.

29. Chase took one of his T-shirts and placed words on the front of it that read:

"I WILL NOT ACCEPT WHAT GOD
HAS CONDEMNED."

30. Chase placed words on the back of the T-shirt that read:

"HOMOSEXUALITY IS SHAMEFUL

"Romans 1:27"

31. Romans 1:27 is a reference to the Biblical verse which states:

> Likewise also the men, leaving the natural use of the woman, burned in their lust for one another, men with men committing what is shameful, and

> receiving in themselves the penalty of their error which was due.

The Holy Bible, New King James Version.

32. Chase wore his expressive T-shirt on April 21, 2004, the "Day of Silence," in response to the promotion of that event.

33. Chase also wore an expressive T-shirt on April 22, 2004 in response to the events of the previous day.

34. While the back of the shirt read the same, Chase modified the words on the front of the T-shirt as follows:

"BE ASHAMED"

"OUR SCHOOL EMBRACED WHAT GOD HAS CONDEMNED."

35. On April 22, 2004, during his second class period at the start of his school day, Chase was told by Defendant David LeMaster, his classroom teacher, that he was in violation of the school's dress code and that he must remove the T-shirt or leave class and report directly to the school office.

36. Chase promptly obeyed that direction and met initially with Defendant Lynell Antrim, a Poway High School Vice Principal, who told Plaintiff that his T-shirt was clearly in violation of the school dress code because it had a "homemade" message, as opposed to a printed or more permanent message on the garment.

37. Defendant Lynell Antrim also told Chase that the words on the T-shirt were "inflammatory," and she instructed Chase that he must replace the T-shirt.

38. Defendant Lynell Antrim also said that if Chase would agree to change his T-shirt, he could return to class.

39. Chase politely refused to be silenced in this way and was then directed to wait until the Principal would be available to discuss the disciplinary action that would follow in his case.

40. Defendant Lynell Antrim then sent Chase to Defendant Scott Fisher's office.

41. Chase was interviewed by Defendant Scott Fischer in the company of an unidentified adult female individual who is believed, and therefore alleged, to be a district official observer from another school within the Poway School District, believed to be the Abraxis Continuation School.

42. During the interview time with Defendant Scott Fischer, Chase was asked repeatedly by Defendant Scott Fischer why he had worn his T-shirt to school on both days, was told by Defendant Scott Fischer that his T-shirt was too "aggressive," and that wearing it would not be tolerated at Poway High School.

43. Defendant Scott Fisher stated that it would not matter whether the T-shirt was homemade or whether it was a pre-manufactured T-shirt as the punishment would be the same because the content was inflammatory.

44. Defendant Scott Fisher ended the discussion by informing Chase that because he had been both courteous and respectful to school authorities his punishment would be mitigated but that he was going to be suspended from school, that he would remain in an office until the school day was over, and that he would then be required to depart the school grounds by the most direct route.

45. Defendant Scott Fischer stated that Chase was not to leave the small office in which he was detained for any reason unless he had an escort.

46. As the day wore on, Chase received his belongings, including his backpack and his lunch, which he had earlier left in his classroom.

47. Except for supervised visits to the toilet room, Chase remained in the school office until the end of the school day.

48. Through the course of the afternoon, various School security personnel visited Plaintiff and engaged him in conversations.

49. One of them, a former coach of Chase, pointedly questioned Chase as to why he would wear such a T-shirt and he encouraged him to question whether it was "worth it."

50. A Deputy Sheriff came to interrogate Chase while he was detained in this office. At the time, he presented his badge to Chase and at all times during the visit was openly carrying a firearm. The Deputy also took a number of photographs of Chase but did not arrest him. True and correct copies of three of those photographs are attached as Exhibit "A."

51. The Deputy informed Chase that he was there to determine if he was a dangerous student, to find out why he wore the particular T-shirt, and to determine if he was going to engage in similar behavior in the future.

52. The Deputy proposed to Chase that as a member of the Christian faith he should understand that Christianity was based on love not hate, and that Chase should not be offensive to others.

53. The Deputy told Chase that his T-shirt was "inflammatory" and "could encourage_uprising and violence against homosexuals."

54. Finally, toward the very end of the school day, Chase was told to collect his things and go to Defendant Ed Giles' office.

55. Chase walked into Defendant Ed Giles' office and closed the door as directed.

56. During a 10-15 minute visit, Chase was told that Defendant Ed Giles knew his family and his youth pastor, and that he, Defendant Ed Giles, was also a Christian believer.

57. Defendant Ed Giles stated that when he came to the school he had to leave his faith "in the car."

58. Defendant Ed Giles further advised Chase that when he comes to Poway High School, if his religious beliefs are offensive, he too must "leave his faith in the car."

59. Chase respectfully told Defendant Ed Giles that he could not do that.

60. Following this final "counseling" session at the end of the day, Chase was told he was free to go home but that he was to proceed immediately and directly off campus and remain off campus for the rest of the day.

61. Chase was thus not allowed to go to his locker to get his homework.

62. Chase complied with the directions of the school administrators in every particular.

63. Defendants did not notify either of Chase's parents until shortly before the end of the school day.

64. Defendant Ed Giles made the call to Plaintiff Ron Harper informing him that his son had been detained and suspended for the day for wearing the expressive T-shirt.

65. Initially, Plaintiff Ron Harper was told that the problem was that "homemade shirts are not allowed."

66. Plaintiff Ron Harper stated that he had seen other homemade shirts at the School before and was then told that "only positive community messages were allowed" and that shirts with "negative" messages were not allowed.

67. Plaintiff Ron Harper asked who was responsible for determining whether a message was positive or negative and was told that it was at the Principal's discretion.

68. The following day, Plaintiff Ron Harper went to the School to discuss his son's suspension and was told that Chase had conducted himself honorably and with respect to School administrators at all times.

69. Plaintiff Ron Harper was also informed that there had been no disruptions, altercations or other incidents among students at the school giving rise to his son's suspension.

70. Poway High School has published a student policy handbook that includes a section entitled "Socially Responsible Behavior" (Policy). This Policy, at page 15 of the handbook, states in relevant part:

> C. Dress: School clothing should be neat, clean, and appropriate for school activities and should follow the standards of common decency. The dress code will be enforced at school-sponsored activities. Clothing that violates this standard is unacceptable, and the student in violation will be disciplined appropriately.
>
> Examples of unacceptable dress are as follows:
>
> . . . .
>
> 3. Clothing and accessories (including backpacks) that promote or portray:
>
> . . . .
>
> e. Violence or hate behavior including derogatory connotations directed toward sexual identity.

A true and correct copy of this policy is attached as Exhibit "B."

71. Defendants, and each of them, wrongfully interpreted and/or applied this Policy to Chase for wearing his T-shirt containing religious expression criticizing homosexual behavior. Defendants will continue to interpret this policy to prohibit the same speech by Chase, Kelsie Harper, or any other similarly-situated student that is critical of homosexual behavior.

72. Poway High School's "Socially Responsible Behavior" policy at Section C.3.e. is, on its face, and as

applied in this case, overbroad, impermissibly vague and subject to abuse. This policy effectively grants unbridled discretion to school officials as to its application and it therefore violates the First and Fourteenth Amendments of the United States Constitution.

73. Since July 29, 1991, the Poway Unified School District has maintained a Board Policy relating to student personnel and their freedom of speech and expression. The Board Policy at Article 5.0, Section 5.6 in relevant part provides as follows:

> Students attending schools within the District have the right to exercise free expression including, but not limited to, the use of bulletin boards, distribution of printed materials or petitions, and wearing buttons, badges, and other insignia. The Board respects students' rights to express ideas and opinions, take stands, and support causes, whether controversial or not, through their speech, their writing, their clothing, and the printed materials they choose to post or distribute.
>
> . . . .
>
> In the exercise of the student rights described above, no student shall distribute materials, wear buttons or displays, or post notices or other materials which:
>
> 1. Are obscene to minors according to current legal definitions.
>
> 2. Are libelous or slanderous according to current legal definitions.
>
> 3. Incite students so as to create a clear and present danger of the imminent commission

of unlawful acts on school premises or of the violation of lawful school regulations or of the substantial disruption of the orderly operation of the school.

4. Express or advocate racial, ethnic, or religious prejudice so as to create a clear and present danger of imminent commission of unlawful acts on school premises or of the violation of lawful school regulations or of the substantial disruption of the orderly operation of the school.

A true and correct copy of this policy is attached as Exhibit "C."

74. Neither Chase Harper's T-shirt message nor any of his behavior while attending school on April 21 and 22, 2004 in any way created a clear and present danger of imminent commission of unlawful acts on school premises or constituted the violation of lawful school regulations, or threatened substantial disruption of the orderly operation of the school.

75. Since July 28, 1997, the Poway Unified School District has maintained a Board Policy relating to student personnel and their freedom of speech and expression. The Board Policy at Article 5.0, Section 5.28.1 concerns so-called hate behavior and, in relevant part, provides as follows:

> In order to foster a supportive environment for a diverse student body, the Poway Unified School District provides guidelines to assist schools in the reduction and/or prevention of hate behavior.
>
> For the purpose of these guidelines the operational definition of hate behavior is as follows:

> A hate behavior is any act or attempted act to cause physical injury, emotional suffering, or property damage through intimidation, harassment, racial/ethnic slurs and bigoted epithets, vandalism, force or the threat of force, motivated all or in part by hostility to the victim's real or perceived gender, race, ethnicity, religion, sexual orientation, or mental or physical challenges. . . .

76. The remainder of Board Policy is a confusing selection of subjective sentence fragments collected under three subtitles: "Hate Behavior Deterrence Guidelines," "Hate Behavior Response Guidelines," and "Examples of Hate Behavior."

77. The purported preventative policy, laced as it is with undefined phrases and jargon, is, on its face, vague, subjective, ambiguous, overbroad and inevitably subject to unfettered arbitrary discretion in its application. A true and correct copy of this policy is attached as Exhibit "D."

78. Plaintiffs are informed and believe and on that basis allege that Defendants, in this case, rely on Board Policy 5.28.1 to justify their censorship of Chase Harper and their intent to continue the application of said policy against Plaintiffs and other students.

79. Board Policy 5.28.1 on its face, and to the extent of its application against Plaintiffs, violates their rights under the First and Fourteenth Amendments to the Constitution of the United States.

80. Chase Harper, in particular, suffered unlawful discrimination, humiliation and punishment at the hands of Poway High School personnel in violation of School Board policy and the Constitution of the United States

simply because School personnel disapproved of the viewpoint Chase wished to express.

81. Since Defendants, and each of them, have established and are maintaining under color of law of the State of California a policy of denying Plaintiffs the free exercise of religion, Plaintiffs have suffered, are suffering, and will continue to suffer severe and irreparable injury by virtue of Defendants' acts, policies and practices as set forth herein. Their fundamental constitutional rights have been violated and will continue to be violated.

82. Chase wants to continue wearing a T-shirt expressing the same message to Poway High School. Similarly, Kelsie desires to express an identical message through speech and/or clothing regarding her religious viewpoint of homosexuality to Poway High School. Specifically, they plan to express their message during next year's Day of Silence event – believed to be planned for April 12, 2006 – expressing, to wit: "Homosexuality is shameful," "Romans 1:27," "Be ashamed," and "Our school has embraced what God has condemned." The Defendants' policies still forbid this message. Under their policies and practices, Chase and Kelsie would be forced to cover up or remove any clothing expressing this message. If they refused to remove or cover up their expression, they would be suspended for the rest of the day, just as they did with Chase on April 22, 2004.

83. The acts of Defendants, and each of them, are chilling and deterring Plaintiffs' free exercise of rights of speech, religious expression, petition, and press. Plaintiffs have no plain, adequate, or complete remedy at law to redress the violations of their rights, and this suit for injunction, declaratory judgment, and damages is their

only means of securing complete and adequate relief. No other remedy would offer Plaintiffs substantial and complete protection from continuation of Defendants' unlawful and unconstitutional acts, policies, and practices.

V.

STATEMENTS OF LAW

84. Students do not shed their constitutional rights at the schoolhouse gate.

85. Non-disruptive, individual student expression is protected by the First Amendment of the United States Constitution.

86. All alleged acts of Defendants, their officers, agents, servants, employees, or persons acting at their behest or direction were done, and are continuing to be done, under the color and pretense of state law, including the statutes, regulations, customs, policies, and usages of the State of California.

87. Unless and until the enforcement of Defendants' current policies identified herein and practices are enjoined, Plaintiffs will suffer, and continue to suffer, irreparable harm to their federal and state constitutional and statutory rights.

VI.

FIRST CAUSE OF ACTION

Violation of Freedom of Speech

Under the First Amendment to the United States Constitution

88. Plaintiffs re-allege and incorporate herein by reference all preceding paragraphs.

89. Religious speech is protected speech under the First Amendment.

90. The Policies, including, but not necessarily limited to, School Board Policy Section 5.28.1 and Poway High School student handbook at page 15 (collectively hereinafter referred to as "Policies") and Defendants' enforcement thereof:

a. are vague and overbroad;

b. single out religious speech for discriminatory treatment;

c. discriminate against speech because of its content;

d. discriminate against speech on the basis of the speaker's viewpoint;

e. restrain constitutionally protected speech in advance of its expression, with virtually no guidelines or standards to guide the discretion of School officials charged with enforcing the policy;

f. chill the free speech and free exercise of religion of Plaintiffs and other students;

g. allow the exercise of unbridled discretion; and

h. improperly prohibit speech merely because it may allegedly be "negative" or offensive.

91. Defendants have no compelling reason that would justify their censorship of Chase Harper's T-shirt and the religious viewpoint sought to be expressed by Plaintiffs in the future.

92. Defendants' policies, and the enforcement thereof, thus violate the Free Speech Clause of the First Amendment to the United States Constitution, made applicable to the states through the Fourteenth Amendment.

WHEREFORE, Plaintiffs respectfully pray the Court grant the equitable and legal relief set forth in the prayer for relief.

VII.

SECOND CAUSE OF ACTION

Violation of the Free Exercise Clause of the First Amendment to the United States Constitution

93. Plaintiffs re-allege and incorporate herein by reference all preceding paragraphs.

94. Plaintiff have sincerely-held religious beliefs which are central to their Christian faith that compel them to express their opposition to homosexual behavior.

95. Plaintiffs' sincerely-held religious beliefs are based upon Biblical precepts and a Christian worldview.

96. A facially-neutral policy may violate the Free Exercise Clause when it is implicated in connection with another constitutional right such as the freedom of speech.

97. The Policies and Defendants' enforcement thereof substantially burden religious expression that is critical of homosexual behavior.

98. Defendants have no compelling reason that would justify their censorship of religious expression that is critical of homosexual behavior.

99. The Policies and Defendants' enforcement thereof therefore violate the Free Exercise Clause of the First Amendment to the United States Constitution, made applicable to the states under the Fourteenth Amendment.

WHEREFORE, Plaintiffs respectfully pray the Court grant the equitable and legal relief set forth in the prayer for relief.

VIII.

THIRD CAUSE OF ACTION

Violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution

100. Plaintiffs re-allege and incorporate herein by reference all preceding paragraphs.

101. Under the Policies, Defendants have allowed other students to wear homemade T-shirts while suspending Chase Harper for wearing his homemade T-shirt.

102. Under the Policies, Defendants have allowed other students and School officials to express their secular

and religious viewpoints on the issue of homosexuality but have censored Plaintiffs and other like-minded students from expressing their religious viewpoints on the issue of homosexuality.

103. Under the Policies, Defendants have allowed other students and School officials to express their allegedly "positive" viewpoints on the issue of homosexuality but have censored Plaintiffs and other like-minded students from expressing their allegedly "negative" viewpoints on the issue of homosexuality.

104. While allowing other similarly-situated students and School officials to express their secular and religious viewpoints on homosexuality, Defendants have specifically targeted Plaintiffs' viewpoints for censorship because Defendants find Plaintiffs' viewpoints to be offensive and unacceptable based upon Plaintiffs' adherence to Biblical passages.

105. Defendants' enforcement of the Policies intentionally treats Plaintiffs differently than other similarly-situated students based on the content and viewpoint of their expression.

106. Defendants have no rational or compelling reason that would justify their disparate treatment of Plaintiffs.

107. The Policies, and Defendants' enforcement thereof, therefore violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

WHEREFORE, Plaintiffs respectfully pray the Court grant the equitable and legal relief set forth in the prayer for relief.

IX.

FOURTH CAUSE OF ACTION

Violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution

108. Plaintiffs re-allege and incorporate herein by reference all preceding paragraphs.

109. The Policies are vague and lack sufficient objective standards to curtail the discretion of School officials, which allow Defendants to enforce the policies in an *ad hoc* and discriminatory manner.

110. Defendants have no compelling reason that would justify their censorship of the religious expression on Chase Harper's T-shirt.

111. The Policies, and Defendants' enforcement thereof, therefore violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

WHEREFORE, Plaintiffs respectfully pray the Court grant the equitable and legal relief set forth hereinafter in the prayer for relief.

X.

FIFTH CAUSE OF ACTION

Violation of the Establishment Clause of the First Amendment to the United States Constitution

112. Plaintiffs re-allege and incorporate herein by reference all preceding paragraphs.

113. The Policies, and Defendants' enforcement thereof, are hostile toward religion.

114. The Policies, and Defendants' enforcement thereof, treated Chase Harper as a second-class citizen of the School community because of his protected religious expression.

115. The Policies allow School district officials to approve one religious message over another and irreligion over religion.

116. Defendants therefore violated the Establishment Clause of the First Amendment to the United States Constitution as incorporated and applied to the states under the Fourteenth Amendment.

WHEREFORE, Plaintiffs respectfully pray the Court grant the equitable and legal relief set forth hereinafter in the prayer for relief.

XI.

SIXTH CAUSE OF ACTION

Violation of Civil Rights Guaranteed by California Civil Code § 52.1

117. Plaintiffs re-allege and incorporate herein by reference all preceding paragraphs.

118. Plaintiffs bring their sixth cause of action against Defendants Jeff Mangum, Linda Vanderveen, Penny Ranftle, Steve McMillan, Andy Patapow, Dr. Donald A. Phillips, Scott Fisher, Lynell Antrim, Ed Giles, and David LeMaster in their individual capacities only.

119. Defendants, and each of them, interfered or attempted to interfere with Chase Harper's constitutional rights by the use of threats, intimidation, and/or coercion, in that Defendants threatened expulsion, suspension

and/or other discipline, and engaged in intimidation and coercive tactics. These tactics were intended to and have compelled Chase and Kelsie to forgo their constitutional rights.

120. In fact, Chase was suspended from classroom instruction, detained in a small office for most of the school day, interrogated by a Deputy Sheriff, "counseled" by numerous School district officials, and, in the end, told to "leave his faith in the car."

121. As a direct and proximate result of the conduct of Defendants, and each of them, both Chase and Kelsie have suffered, and will continue to suffer, from the deprivation of their constitutional liberties.

122. Defendants' violation of Chase's and Kelsie's rights as guaranteed by Civil Code § 52.1 entitles them to compensatory and punitive damages, a $25,000 civil penalty, attorneys fees and injunctive relief, all of which are provided for in Civil Code §§ 52.1(b) and 52, and are requested below.

123. In doing the acts alleged in this Complaint, Defendants knew, or should have known, that their actions were likely to injure Plaintiffs. Plaintiffs are informed and believe, and therefore allege, that Defendants intended to cause injury to Chase and acted with a willful and conscious disregard of Chase's rights as secured by Civil Code § 52.1, thus entitling Chase to recover punitive damages pursuant to Civil Code § 52(b)(1).

124. Pursuant to Civil Code § 52.1, Chase and Kelsie are entitled to bring an action for damages and injunctive relief as set forth in Civil Code § 52.

WHEREFORE, Plaintiffs respectfully pray the Court grant the equitable and legal relief set forth hereinafter in the prayer for relief.

XII.

SEVENTH CAUSE OF ACTION

Violation of Free Speech Rights Guaranteed by California Education Code § 48950

125. Plaintiffs re-allege and incorporate herein by reference all preceding paragraphs.

126. Plaintiffs bring their seventh cause of action against Defendants Jeff Mangum, Linda Vanderveen, Penny Ranftle, Steve McMillan, Andy Patapow, Dr. Donald A. Phillips, Scott Fisher, Lynell Antrim, Ed Giles, and David LeMaster in their individual capacities only.

127. The Defendants have imposed and continue to threaten disciplinary sanctions solely on the basis of conduct that is speech protected both on and off campus by the First Amendment to the U.S. Constitution and Section 2 of Article I of the California Constitution.

128. The Defendants' restrictions on Plaintiffs' speech:

a. discriminate against speech on the basis of the speaker's viewpoint;

b. discriminate against speech on the basis of its content;

c. chill the free speech rights of Plaintiffs and other students;

d. restrain constitutionally protected speech in advance of its expression; and

e. improperly prohibit speech merely because it may allegedly be "negative" or offensive.

129. Defendants have no compelling reason that justifies their censorship of Chase Harper's t-shirt and the viewpoint the Plaintiffs wish to express in the future.

130. Defendants' censorship of Plaintiffs' expression is not a reasonable time, place, or manner restriction.

131. Defendants are therefore violating California Education Code § 48950.

WHEREFORE, Plaintiffs respectfully pray the Court grant the equitable and legal relief set forth in the prayer for relief.

XIII.

EIGHTH CAUSE OF ACTION

Violation of Free Expression Rights Guaranteed by California Education Code § 48907

132. Plaintiffs re-allege and incorporate herein by reference all preceding paragraphs.

133. Plaintiffs bring their eighth cause of action against Defendants Jeff Mangum, Linda Vanderveen, Penny Ranftle, Steve McMillan, Andy Patapow, Dr. Donald A. Phillips, Scott Fisher, Lynell Antrim, Ed Giles, and David LeMaster in their individual capacities only.

134. Defendants have prohibited Plaintiffs from wearing clothing that expresses speech protected by the

First Amendment to the U.S. Constitution and Section 2 of Article I of the California Constitution.

135. Plaintiffs' expression is not obscene, libelous, or slanderous.

136. Plaintiffs' expression does not so incite students as to create a clear and present danger of the commission of unlawful acts on school premises or the violation of lawful school regulations, or the substantial disruption of the orderly operation of the school.

137. Defendants' policies, and the enforcement thereof, thus violate California Education Code § 48907.

WHEREFORE, Plaintiffs respectfully pray the Court grant the equitable and legal relief set forth in the prayer for relief.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for judgment as follows:

A. That this Court issue Preliminary and Permanent Injunctions enjoining Defendants, Defendants' agents, employees, and all persons in active concert or participation with them from violating Plaintiffs' constitutional and statutory rights by selectively banning religious expression in school;

B. That this Court render a Declaratory Judgment declaring that Defendants' Policies, including, but not necessarily limited to, School Board Policy Section 5.28.1 and Poway High School student handbook at page 15, and Defendants' practice of selectively banning religious

expression violates the First and Fourteenth Amendments to the United States Constitution as well as California Education Code §§ 48907 and 48950;

C. Adjudge, decree, and declare the rights and other legal relations with the subject matter here in controversy in order that such declaration shall have the force and effect of final judgment;

D. Retain jurisdiction of this matter for the purpose of enforcing this Court's order;

E. Grant an award of nominal damages in an amount this Court deems appropriate;

F. Grant punitive damages pursuant to Civil Code § 52(b)(1) and a statutory civil penalty of $25,000 pursuant to Civil Code § 52(b)(2);

G. Grant to Plaintiffs reasonable costs and expenses of this action, including attorneys fees in accordance with 42 U.S.C. § 1988, California Civil Code § 52(b)(3), and California Education Code § 48950; and

H. Grant such other and further relief as this Court deems just and proper.

DEMAND FOR JURY TRIAL

Plaintiffs hereby respectfully request a jury trial.

Dated: August 10, 2005

Respectfully submitted,

ALLIANCE DEFENSE FUND

By: _____
TIMOTHY D. CHANDLER
Attorneys for Plaintiffs

VERIFICATION

We, the undersigned, citizens of the United States and residents of the State of California, have read the foregoing **SECOND AMENDED VERIFIED COMPLAINT AND DEMAND FOR JURY TRIAL** and declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct.

Dated this ___ day of August 2005.

_____

Ron Harper

_____

Tyler Chase Harper

_____

Kelsie K. Harper

APPENDIX I

ALLIANCE DEFENSE FUND
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Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

TYLER CHASE HARPER, a minor, by and through his parents RON and CHERYL HARPER, Plaintiffs, v. POWAY UNIFIED SCHOOL DISTRICT; JEFF MANGUM, LINDA VANDERVEEN, PENNY RANFTLE, STEVE	CASE NO. 04CV1103 JAH (POR) Honorable John A. Houston Courtroom 3 **DECLARATION OF CHASE HARPER IN SUPPORT OF PLAINTIFFS' REPLY TO DEFENDANTS' OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION**

MCMILLAN, and ANDY PATAPOW, all individually and in their official capacity as Members of the Board of the Poway Unified School District; DR. DONALD A. PHILLIPS, individually, and in his official capacity as Superintendent of the Poway Unified School District; SCOTT FISHER, individually and in his official capacity as Principal of Poway High School; LYNELL ANTRIM, individually and in her official capacity as Assistant Principal of Poway High School; ED GILES, individually and in his official capacity as Vice Principal of Poway High School; and DAVID LEMASTER individually and in his official capacity as Teacher of Poway High School; and DOES 1 through 20 inclusive, Defendants.	Date: August 26, 2004 Time: 10:30 a.m. (Filed Aug. 19, 2004)

I, Chase Harper, declare as follows:

1. I am sixteen years of age and am a Plaintiff in this action. I attend Poway High School. I have personal knowledge of the facts contained herein. If called upon to testify, I could and would, competently testify to the facts stated herein.

2. On April 21, 2004, I personally observed numerous posters advertising the Day of Silence and advocating the homosexual lifestyle at Poway High School. When being counseled by Principal Scott Fisher, he told me that only school approved posters were allowed to be displayed. I also observed students and faculty members wearing T-shirts and pins promoting the Day of Silence and/or the Gay Straight Alliance student club. According to the school newspaper, the pins were being handed out to students on the day of silence.

3. Mr. Fisher informed me that my punishment for refusing to remove the T-shirt was an "in-school suspension." However, he also informed me that there would be no disciplinary record placed in my file. I informed Mr. Fisher that I had discussions with other students regarding my T-shirt outside of regular class time. Although some students may have certainly disagreed with my views expressed, all of my conversations with students were peaceful discussions wherein differing viewpoints were communicated. I never witnessed any hostile or unsettling confrontations on either day that I wore my expressive T-shirts. I have not witnessed any incident where any disruption to the operations of the school occurred as a result of my T-shirts or as a result of any communication regarding the homosexual lifestyle.

3. In 2003, I am also aware that an earlier Day of Silence was held at Poway School District. While I was not at school that day, the school newspaper reported that a cross-dressing person spoke at school on the Day of Silence.

I declare under the penalty of perjury under laws of the United States of America and the State of California that the foregoing is true and correct and that this declaration was signed in San Diego, California.

Dated: 8-19-04 /s/ Chase Harper
Chase Harper

APPENDIX J

ALLIANCE DEFENSE FUND
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Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

TYLER CHASE HARPER, a minor, by and through his parents RON and CHERYL HARPER, Plaintiffs, v. POWAY UNIFIED SCHOOL DISTRICT; JEFF MANGUM, LINDA VANDERVEEN, PENNY RANFTLE, STEVE	CASE NO. 04CV1103 JAH (POR) Honorable John A. Houston Courtroom 3 **DECLARATION OF JOEL RHINE IN SUPPORT OF PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS**

MCMILLAN, and ANDY PATAPOW, all individually and in their official capacity as Members of the Board of the Poway Unified School District; DR. DONALD A. PHILLIPS, individually, and in his official capacity as Superintendent of the Poway Unified School District; SCOTT FISHER, individually and in his official capacity as Principal of Poway High School; LYNELL ANTRIM, individually and in her official capacity as Assistant Principal of Poway High School; ED GILES, individually and in his official capacity as Vice Principal of Poway High School; and DAVID LEMASTER individually and in his official capacity as Teacher of Poway High School; and DOES 1 through 20 inclusive, Defendants.	Date: August 26, 2004 Time: 10:30 a.m. (Filed Aug. 19, 2004)

I, Joel Rhine, declare as follows:

1. I am eighteen years of age and graduated from Poway High School in 2004. I have personal knowledge of the facts contained herein. If called upon to testify, I could and would, competently testify to the facts stated herein.

2. During the last four years at Poway High School, I have personally observed the peaceful expression of differing opinions between students regarding the political and religious issues regarding the homosexual lifestyle. I have never witnessed a hostile confrontation between students or between students and administrators regarding this issue. However, after attending Poway High School for the last four years, I have developed a confident impression that the administration is intolerant of religious and political viewpoints that disapprove of the homosexual lifestyle. This impression has developed, in part, as a result of the events and circumstances stated herein.

3. During my sophomore year (2001-2002), I personally observed a student named Phil Cochran who wore a T-shirt to Poway High School that had the following words written: "Straight Pride." That day that I observed the T-shirt on Mr. Cochran, he was sent to the administration as a result of the words, "Straight Pride." Mr. Cochran was disciplined by the administration and was not allowed to return to class.

4. During my junior year (2002-2003), I attended Poway High School on the day set aside for the Day of Silence. I recall viewing many posters displayed on campus that advocated the homosexual lifestyle and promoted tolerance for homosexuals. Additionally, I recall seeing students in my classes that were participating in the Day of Silence. Some students wore duck tape over their mouths. Some of the students with duck tape had written messages on the duck tape endorsing the homosexual lifestyle. When called upon by teachers in class, students with duck tape handed cards to the teachers explaining why they had duck tape over their mouths and why they

would not speak. Some students wore black T-shirts that said "National Day of Silence" and contained a purple square with a yellow "equal" sign in the middle. I presumed the T-shirts were advocating additional rights for persons engaged in the homosexual lifestyle. I also observed students wearing pins on their clothing and cars in the school parking lot with the same purple square and yellow "equal" sign.

5. In my senior year (2003-2004), I again attended Poway High School on the day set aside as the Day of Silence. I again saw students wearing black shirts with the same purple square and yellow "equal" sign. I also observed numerous posters advertising the Day of Silence and advocating the homosexual lifestyle. One particular poster depicted a cartoon character crying with a purple background. The poster said something to the effect of "Stop the Hate" and contained other statements promoting tolerance and the homosexual lifestyle. Interestingly, the poster had slang terms preprinted that referred to homosexuals as "fags" and "queers." The poster also had preprinted terms that said "that's so gay," "loser," and other terms. These terms were pre-printed as an apparent attempt to bring political awareness for, and gain concern for, persons who have chosen the homosexual lifestyle.

6. During my years at Poway High School, I have regularly observed students displaying rainbows on backpacks, buttons, bumper stickers, and T-shirts. The rainbow is well known on campus to be a sign endorsing the homosexual lifestyle. In fact, when I was a freshman, I observed a boy wear a T-shirt on multiple occasions that had following words in between two rainbows: "I Kiss Boys."

7. I was also in attendance at Poway High School on the day after the Day of Silence in April 2004 when Chase Harper was sent to the administration for discipline. As a friend of Chase Harper, I spoke to some students about Chase's T-shirt. While Chase's T-shirt prompted a few discussions in school hallways between some students, I never observed any hostile, intimidating, or aggressive confrontations of any kind nor did I observe any disruptions to the normal operations of the school. Further, I am not aware of any significant events on either the Day of Silence or the day after that caused any disruption to the normal operations of the school.

8. In the last four years, I have observed students advocating the homosexual lifestyle without any apparent objection by the school administration and without any apparent discipline of such students. Meanwhile, students outwardly expressing an opposite religious or political view have not generally been tolerated.

I declare under the penalty of perjury under the laws of the United States of America and the State of California that the foregoing is true and correct and that this declaration was signed in Rancho Bernardo, California.

Dated: 8-18-2004 /s/ Joel Rhine
Joel Rhine

APPENDIX K

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Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

TYLER CHASE HARPER, a minor, by and through his parents RON and CHERYL HARPER, Plaintiffs, v. POWAY UNIFIED SCHOOL DISTRICT; JEFF MANGUM, LINDA VANDERVEEN, PENNY RANFTLE, STEVE	CASE NO. 04CV1103 JAH (POR) Honorable John A. Houston Courtroom 3 **DECLARATION OF RON HARPER IN SUPPORT OF PLAINTIFFS' REPLY TO DEFENDANTS' OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION**

MCMILLAN, and ANDY PATAPOW, all individually and in their official capacity as Members of the Board of the Poway Unified School District; DR. DONALD A. PHILLIPS, individually, and in his official capacity as Superintendent of the Poway Unified School District; SCOTT FISHER, individually and in his official capacity as Principal of Poway High School; LYNELL ANTRIM, individually and in her official capacity as Assistant Principal of Poway High School; ED GILES, individually and in his official capacity as Vice Principal of Poway High School; and DAVID LEMASTER individually and in his official capacity as Teacher of Poway High School; and DOES 1 through 20 inclusive, Defendants.	Date: August 26, 2004 Time: 10:30 a.m. (Filed Aug. 19, 2004)

I, Ron Harper, declare as follows:

1. I am the father to Plaintiff Chase Harper. I have personal knowledge of the facts contained herein. If called upon to testify, I could and would, competently testify to the facts stated herein.

2. On April 22, 2004, I received a telephone call from Ed Giles, Vice Principal at Poway High School, approximately twenty (20) minutes before the end of Chase's last class. I had not received any messages or phone calls from school officials prior to that time of the day. Ed told me that Chase was disciplined by way of an in-school suspension for refusing to take off a T-shirt that was allegedly inflammatory, negative, and in violation of the school dress code. I was told that Chase was polite and respectful.

3. The following day, I visited Tom Pack, another Vice Principal at Poway High School. Tom boastfully told me that he had required other students in the past to remove T-shirts that said "Straight Pride."

I declare under the penalty of perjury under laws of the United States of America and the State of California that the foregoing is true and correct and that this declaration was signed in San Diego, California.

Dated: 8-19-04 /s/ Ron Harper
Ron Harper

APPENDIX L

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Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

TYLER CHASE HARPER, a minor, by and through his parents RON and CHERYL HARPER, Plaintiffs, v. POWAY UNIFIED SCHOOL DISTRICT; JEFF MANGUM, LINDA VANDERVEEN, PENNY RANFTLE, STEVE	CASE NO. 04CV1103 JAH (POR) Honorable John A. Houston Courtroom 3 **DECLARATION OF ROBERT TYLER IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

MCMILLAN, and ANDY PATAPOW, all individually and in their official capacity as Members of the Board of the Poway Unified School District; DR. DONALD A. PHILLIPS, individually, and in his official capacity as Superintendent of the Poway Unified School District; SCOTT FISHER, individually and in his official capacity as Principal of Poway High School; LYNELL ANTRIM, individually and in her official capacity as Assistant Principal of Poway High School; ED GILES, individually and in his official capacity as Vice Principal of Poway High School; and DAVID LEMASTER individually and in his official capacity as Teacher of Poway High School; and DOES 1 through 20 inclusive, Defendants.	Date: August 26, 2004 Time: 10:30 a.m. (Filed Aug. 19, 2004)

1. I, Robert H. Tyler, declare as follows:

2. I am an attorney duly licensed to practice law before courts of California. I represent Tyler Chase Harper in the above captioned case.

3. On July 12, 2004, I obtained a copy of Policy 5.28.1 from the web site of the Poway School District. This policy is identified as a Board Policy on the web site. Attached hereto is a true and accurate copy of Policy 5.28.1. The address of the web site from which I obtained the policy is http://www.powayusd.com/about/board/POLICY/Article%205/5%20TOC.htm.

I declare under the penalty of perjury that the foregoing is true and correct.

Dated: July 12, 2004 ALLIANCE DEFENSE FUND

By: /s/ R. Tyler
ROBERT H. TYLER
Attorneys for Plaintiffs

APPENDIX M

POWAY UNIFIED SCHOOL DISTRICT ADMINISTRATIVE PROCEDURE

ARTICLE: 5.0
STUDENT PERSONNEL

5.28
HATE BEHAVIOR

Originator: Assistant Superintendent
Issue No: 2
Date: 7/28/97
Page: 1 of 2
Reference: Article 1, Section 28(c) California Constitution

Section 5.28.1 Hate Behavior

In order to foster a supportive environment for a diverse student body, the Poway Unified School District provides guidelines to assist schools in the reduction and/or prevention of hate behavior.

For the purposes of these guidelines the operational definition of hate behavior is as follows:

> A hate behavior is any act or attempted act to cause physical injury, emotional suffering, or property damage through intimidation, harassment, racial/ethnic slurs and bigoted epithets, vandalism, force or the threat of force, motivated all or in part by hostility to the victim's real or perceived gender, race, ethnicity, religion, sexual orientation, or mental or physical challenges.

Hate Behavior Deterrence Guidelines

1. Create and support programs designed to promote understanding and to prevent and resolve conflicts among members of a diverse student body, staff, and administration.
2. Reflect appreciation for diversity and pluralism in educational materials.

3. Adopt a curriculum or supplement the current curriculum with course content that has multicultural components.
4. Clearly define and discuss with students, staff, and parents the meaning of hate behavior.
5. Encourage the reporting of hate behavior by posting permanent notices in conspicuous areas.

Hate Behavior Response Guidelines

1. Provide staff training in identifying, reporting, and responding to hate behavior.
2. Establish a simple, well-publicized process for reporting hate behavior.
3. Require appropriate and timely staff response to all reports of hate behavior.
4. Reassure the victim and the victim's family that the incident will be treated seriously.
5. Provide victim assistance if needed, including referral to victim support agencies.
6. Investigate the incident; question witnesses and involve law enforcement as appropriate.
7. Follow-up incident as appropriate: meet with staff, provide student awareness activities, respond to media, etc.
8. Determine and take disciplinary action in concurrence with the Education Code including suspension and recommendation for expulsion.
9. Report incident to the District Office.

Examples of Hate Behavior

The following list provides examples of hate behavior to assist identifying where and when it may exist.

1. Name calling, racial slurs, or bigoted epithets.
2. The presence of symbols or words considered offensive to persons of a specific gender, race, ethnicity, religion, sexual orientation, or the mentally or physically challenged, such as graffiti, slurs or painted swastikas.
3. Activities historically associated with threats to persons of a specific gender, race, ethnicity, religion, sexual orientation, or the mentally or physically challenged (e.g., burning crosses, wearing swastikas or white sheets, flying confederate flags, hanging effigies, defacing pink triangles).
4. The posting or circulation of demeaning jokes or caricatures based on negative stereotypes of a specific gender, race, ethnicity, nationality, religion, sexual orientation, or mental or physical challenged.
5. The defacing, removal, or destruction of posted materials, meeting places, memorials, etc. associated with specific gender, racial, religious, sexual orientation, or mental or physical challenges.
6. Victim belief that the incident was motivated by bias against him/her as a member of a specific gender, race, ethnicity, religion, sexual orientation, or mentally or physically challenged group.
7. Perpetrator explanation/defense of incident involves exalting own gender, race, ethnicity, religion, sexual orientation, or mental or physical status and/or includes statements demeaning victim group.
8. The presence of organized hate group literature and/or posters to reference to an organized hate group.

APPENDIX N

EXHIBIT 1

POWAY UNIFIED SCHOOL DISTRICT

Policies & Procedures for Parents

CONCERNING

HARASSMENT OF STUDENTS

[Symbol Omitted in Printing]

HARASSMENT AND INTIMIDATION ARE ILLEGAL

GENERAL HARASSMENT

In the school environment, harassment may include threats, intimidation, slurs, epithets, verbal or physical abuse, and derogatory or degrading comments. Bullying is a serious form of harassment and may include physical, verbal, or exclusionary practices by a student or group of students. Board Policy 5.8.1 and Education Code Section 48900 and 48900.4 specifically prohibit harassment of this nature.

SEXUAL HARASSMENT

Sexual harassment includes a pattern of unwelcome sexual advances, requests for sexual favors, and other unwanted verbal, visual or physical conduct of a sexual nature. A single incident may also be considered sexual harassment depending upon the circumstances. A pamphlet has been provided for students, which describes sexual harassment and identifies differences between flirting and this form of harassment. Board Policy 5.24 and Education Code Section 212.5 specifically prohibit harassment of this nature.

HATE-MOTIVATED BEHAVIOR OR HARASSMENT

Hate-motivated behavior is any act of attempted act against a student or staff member that is motivated all or in part by hostility to the victim's race, ethnicity, sexual orientation, religion or gender. Board Policy 5.28, Education Code Section 48900.3 and 48900.4, and Title VII of the Civil Rights Act of 1964, and the Educational Amendments of 1972 specifically prohibit harassment of this nature.

SPECIFIC HARASSMENT BEHAVIORS THAT ARE NOT TOLERATED IN THE *POWAY UNIFIED SCHOOL DISTRICT* INCLUDE:

- Force or threat of violence through outright actions, intimidation, or bullying.
- Vandalism to personal or District property.
- Comments, gestures, or touches of a sexual nature that are deliberate and unwelcome,
- Negative comments, slurs, or behaviors based on race, ethnicity, sexual orientation, religion or gender.
- Vulgar letters, notes, posters, or other writings offensive to a specific race, ethnicity, sexual orientation, religion or gender.

WHAT TO DO IF IT HAPPENS TO YOUR SON OR DAUGHTER

Any student who believes he or she has been harassed or discriminated against should immediately inform a parent, teacher, or administrator. The reporting of a

complaint will include an oral interview with a site administrator and may include the submittal of a signed, written statement. All complaints must include dates, issues, description of offending action, and names of individuals and witnesses involved. All complaints are confidential and will be reviewed and investigated. Teachers, site administrators, or District staff will conduct interviews for the purpose of gathering factual information about the circumstances, the context, and the nature of the incident so that appropriate measures can be taken.

In the event that a formal complaint is submitted by the parent or guardian, the District's Title IX Coordinator will be notified. Further investigation, as needed, will commence and will result in a written recommendation to resolve the complaint.

If either complainant or respondent feels that the issue has not been resolved satisfactorily, he or she may forward the complaint to the Superintendent of Poway Unified School District. If it is not resolved there, he or she may pursue resolution through the Board of Trustees. Appeal rights also extend to the California Department of Education or civil court. All complaints will be filed and maintained by the District for Statistical information. All complainants will be provided with copies of the District administrative procedures related to harassment or hate-motivated behaviors. (Policies 5.24, 5.28, 3.34)

Back to PUSD

POWAY UNIFIED SCHOOL DISTRICT

ENSURING A SAFE AND ORDERLY LEARNING ENVIRONMENT FOR ALL

Poway Unified School District is committed to ensuring that all students develop the knowledge, skills, and attitudes essential for success in school and in a diverse society. To meet this goal, we must provide a school climate that is free from harassment and discrimination in any form. Children have the right to flourish in a safe and orderly environment.

This pamphlet is one step in establishing a common core of understanding about what constitutes harassment and about the attitudes, behaviors and responsibilities that must be established to ensure that all students thrive and succeed.

For more detailed information regarding District policies, please log on to the Poway Unified School District's website: http://www.powayusd.com or contact the District's Title IX Coordinator at (858) 748-0010, ext. 2014.

SUPERINTENDENT
Donald A. Phillips, Ed.D.

BOARD OF EDUCATION
Jeff Mangum
Steve McMillan
Andrew Patapow
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Linda Vanderveen

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POWAY, CALIFORNIA 92064-3034
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APPENDIX O

EXHIBIT 2

Resources for Parents

(Poway High Student Services Disclaimer)

Mental Health	Drugs & Drinking	Parenting Help

Miscellaneous

Active **Parenting Classes** are being offered through the District office! Parent University, a grant funded parent education and support project, is offering a dynamic workshop for parents of students' grades 6th-10th. This research-based parenting program offers a proven approach to parenting teens and includes video, discussion and practical solutions. ***You will learn how to talk to your teen about sex, violence and drugs; how to solve problems together; how to build your teens sense of responsibility; how to gain respectful behavior.*** Effective ways to discipline adolescents will be discussed and ways to make parenting less stressful. *For more information, click here!* Each series consists of four 2-hour sessions and we are offering 2 series this Fall: October Wednesdays 6:30-8:30 at BHMS and October Saturday mornings in the Sabre Springs Business Center. For more information please call 858-668-4084 or contact the student Service Specialist at your school.

Mental Health

PUSD District Wellness Page

District Wellness Community Resources at the bottom of the page is a list of Internet resources

***The Caring Connections Center* is an integral part of the Student Assistance Program in the Poway Unified School District. These services are available to all students, at all grade levels, from special education to gifted and talented. Families participate in a "Family Conference" during which school perceptions, goals, family concerns, stressors, medical issues, and family background are discussed. The goal is to build on family strengths, encourage self-advocacy, and awareness of community services that will support student well being. For a referral, call Student Services, 748-0245 ext, 5393.**

http://family.samhsa.gov/ A public education Web site, developed to support the efforts of parents and other caring adults to promote mental health and prevent the use of alcohol, tobacco, and illegal drugs among 7- to 18-year-olds.

http://www.aacap.org/info_families/index.htm American Academy of Child & Adolescent Psychiatry

http://www.nami-northcoastal.org/index.html Local information for families about mental health, especially Shizophrenia [sic], Bipolar, Major Depression, Obsessive Compulsive Disorder (OCD), Anxiety Disorders. Includes links and has Crisis and Suicide Prevention Hotlines.

Self Injury Websites: Commonly known as 'cutting', these sites provide insight into this disorder. http://www.focusas.com/SelfInjury.html; www.palace.net/~llama/psych/injury.html; www.healthyplace.com/community/selfinjury/bloodred; http://www.recoveryourlife.com

Depression: http://www.aacap.org/publications/factsfam/depressd.htm

Eating Disorders Websites: *Getting Treatment; Something Fishy; Body Sense; Prevention*

Grief: *American Hospice on Teen Grief;* http://sdhospice.org/grief.htm San Diego Hospice and Palliative Care offers support groups for adults and teens experiencing a variety of different losses.

Drugs & Drinking

SAFIR: Supporting Adolescents and Families in Recovery – a free weekly support group approved by courts and probation and recovery programs in San Diego County.

When a Child Dies from Drugs: A very supportive book about the bereavement process for families having to cope with such a tragedy.

http://www.theantidrug.com/ Parents: the Anti Drug. Lots of great information regarding teen drug use. Available in Spanish, Cambodian, Vietnamese, Chinese, and Korean.

http://www.parentingisprevention.org/Index.html Parenting is Prevention – lots of advise about drug prevention as well as links for general parenting.

http://www.whitehousedrugpolicy.gov/drugfact/index.html Federally sponsored facts and information.

Parenting Help

Get Out of My Life, but First Could You Drive Me & Cheryl to the Mall: A Parent's Guide to the New Teenager, Revised and Updated An easy to read book that provides a lot of helpful insight to teens.

Parent University, a grant funded parent education and support project, is offering a dynamic workshop for parents of students' grades 6th-10th. This research-based parenting program offers a proven approach to parenting teens and includes video, discussion and practical solutions. You will learn how to talk to your teen about sex, violence and drugs; how to solve problems together; how to build your teens sense of responsibility; how to gain respectful behavior. Effective ways to discipline adolescents will be discussed and ways to make parenting less stressful. **Tuition is minimal and scholarships are available upon request. Each series consists of four 2-hour sessions and we are offering four series this Spring. For more information please call 858-668-4084 or contact the Student Service Specialist at your school.**

http://www.nimh.nih.gov/publicat/teenbrain.cfm The Teenage Brain: a work in progress – ever wonder why teens think differently? Because they think differently!

http://www.planned.org/site/PageServer?pagename=ETparent education How to Talk to your kids about **sex**, from Planned Parenthood. Also from Teen Pregnancy, talking with your kids about teen pregnancy:
http://www.teenpregnancy.org/resources/reading/tips/tips.asp
http://www.teenpregnancy.org/resources/reading/tips/talk_back.asp Ten Things Teens Want Parents To Know About Teen Pregnancy

http://www.ncfy.com/supporti.htm A rather long article with some good ideas for supporting your adolescent.

Miscellaneous

Bullying: http://stopbullyingnow.hrsa.gov/ Information about bullying.

Movies: http://movies.yahoo.com/moviemom/ Wonder what's in the new movies your kids are seeing? Let movie mom tell you about the sex and violence from a parent's perspective.

Video Gaming: http://www.esrb.org/esrbratings_guide.asp Rating system for games.

Divorce: http://www.divorcesource.com/info/children/children.shtml Helpful information for parents going through a divorce. Although often aimed at younger children, the advice holds up for teens as well.

Gender Issues: http://www.familyacceptance.com/ One family's story about reaching acceptance when their child came out as gay. Answers questions and discusses religious aspects along with a page of resources.
http://www.bidstrup.com/parents.htm Especially for parents of pre-college students, with sections on questions about what's happening and on supporting your child.

Testing Tips for Parents & Students: *Click here for* help yourself or your student do their best on tests – relieve anxiety about tests.

Poway High General Parent Hot Sheet for 2004-05

Any other resources that you've found helpful, please drop us a line!

Parent Suggestions!

Dr. William Maxwell, Ed.D., Harvard University, has devoted his life to helping parents in general, and helping raise the IQ of children, in particular. More information about The Inventive Quotient, I.Q. can be found at: http://www.inventivequotient.com

Amigos de las Américas is an international, nonprofit organization that was founded in 1965. *Amigos offers a summer volunteer opportunity!* Amigos trains and provides opportunities for high school and college students to participate in service projects in Latin America. Amigos is dedicated to building partnerships to empower young leaders, advance community development, and strengthen multicultural understanding throughout the Americas. AMIGOS believes in the power and capability of young people to change our world! For more info, visit www.amigoslink.org and check out the local San Diego chapter.

Teton Science School offers summer programs for high school students. It's not CAMP, it's SCHOOL – but it's like camp! Credit can be applied to their PHS transcript. Scholarships are available. Check it out at: http://www.tetonscience.org/

We take reasonable care in linking websites but have no direct control over the content of the linked sites, or the changes that may occur to the content on those sites. It is the responsibility of the user to make their own decisions about the accuracy, currency, reliability and correctness of information contained in linked external web sites. The material on this web site may include the views or recommendations of third parties, which do not necessarily

reflect the views of Student Services, or indicate its commitment to any particular course of action.

APPENDIX P

EXHIBIT 3

FAMILY ACCEPTANCE

Is Homosexuality a Sin?

Are these questions familiar?

- *Did Your Child Come Out to You?*
- *Is My Child Gay or Confused?*
- *Should I accept My Child's Orientation?*
- *Am I Ashamed of My Child or of Myself?*
- *Did My Parents Make Me Gay?*
- Is Homosexuality a Sin?
- *Who Can I Talk to About This?*
- *What is God's Plan?*
- *Why Would My Child Choose to be Gay?*

Other Points of Interest

- *Our Son's Story.*
- *Hope . . . How Our Family Has Progressed.*

When it comes to the subject of homosexuality, our religious institutions remind me of the Civil Rights Movement of the 60's. The position of each church or synagogue was so varied it was hard to believe that we were reading from the same Bible or believing in the same God. Scriptures seemed to support segregation on one side and social justice on the other.

During my teenage years, I remember wondering why my church did more to impede the civil rights movement than to take a courageous stand on its behalf. We were told from the pulpit that God never intended on the mixing of

the races. The idea of black people eating in a public restaurant, riding in the front of the bus, or attending the same high school was unthinkable. In retrospect, the thought of denying any of God's children of that right is unconscionable.

Many churches and religious groups quote scriptures that denounce homosexuality. Yet the same scriptures that equally condemn divorce are totally ignored. Because of the shame and embarrassment associated with homosexuality, most of us allow this hypocrisy to go unchallenged.

There are seven deadly sins in the Bible: Pride, Lust, Gluttony, Anger, Sloth, Envy, and Greed. Homosexuality is not among them. Why not?'

Jesus walked hundreds of miles and spoke to thousands of people. Because he surrounded himself with social outcasts, he must have met what we today consider gay and lesbian people. Yet He said nothing about homosexuality. Why not?

If homosexuality were so sinful, wouldn't Jesus have either addressed it or condemned it?

God's love and acceptance is far greater than any of us can ever imagine and is never limited by the thoughts of man. I have no magic answer why God created some of His children gay. I do know that He does not withhold His love from them anymore than He did His black children, even though some of His white children thought he should.

APPENDIX Q

EXHIBIT 4

Resources for Parents of Gay, Lesbian, Bisexual and Transgendered Youth

Resources for the parents of gay, lesbian, bisexual and transgendered youth . . .

My Child is GAY! Now What Do I Do?

presented and maintained by Scott Bidstrup

What is happening to me? And to my Child?

What's happening is that you're finding out something very important about who your child is, and your child has revealed something very important to you about who he or she is. This can be a shattering experience for a parent, or it can be a growing experience. It depends on you.

There are some definite stages to the process you have embarked upon, whether willingly or not. They involve learning and growing. Sometimes it will be painful, sometimes joyful. What you get out of it depends on what you're willing to put into it, and how open you can hold your mind.

Some parents hold their prejudices more dearly than their children and actually reject their children outright, and simply disown them and throw them out on the street. You probably haven't done that, or you wouldn't be reading this. Right there, that puts you statistically ahead of fully one fourth of parents of gay children.

Now if you want make the best of this and know what sort of things you are going to go through as a parent of a gay

child, read this letter from *Jim Lokken* to learn a little more about the process and what you'll learn.

Why did my child have to tell me?

Your child wants to be honest with you. Trying to pretend to be something he or she is not, is a tremendous burden, one that carries with it a great deal of guilt and shame. You've tried to teach your child honesty, and now your child has shown that he or she loves you enough to be honest with you about who he or she is, even at great personal risk of rejection. In making this revelation, your child has lifted a great burden of guilt and shame from his or her shoulders, and you need to understand what a great relief it is to not have to lie about who you are.

As a parent, you doubtlessly value honesty in your child a great deal. It is a mark of his or her character. And the fact that your child has entrusted you with this information is an indication that your efforts in teaching him or her honesty and integrity have paid off.

While this is undeniably a great burden for you, it is also an opportunity. The opportunity lies in the fact that you now know your child better than you ever did, and so this situation affords you the opportunity to get closer to your child than you have ever been. If you can be honest with your child about your own feelings, and how you love him or her in spite of this revelation, you can use this situation to draw closer to your child and become more important to him or her than you have ever been. Isn't this what you want as a parent?

Is it my fault?

Wondering if you did something wrong? Wondering if there is something you *didn't* do right? Why has this happened to you?

Don't feel guilty. You didn't do anything wrong. Chances are you're a wonderful parent, and your gay child is going to be a wonderful adult like yourself. *Your gay or transgendered child isn't that way because of anything you did,* nor anything anyone else did, for that matter.

As science learns more about the origins of homosexuality and transgenderism, it is becoming increasingly clear that these orientations have their origins very early in life. Most gay men and a large number of lesbians will tell you that they knew early in life – in some cases, awareness of being "different" are among the earliest memories. Some evidence even indicates prenatal influences, even genetic patterns are involved.

The old claim by psychologists that homosexuality indicates a weak father and a domineering mother have long since been disproven by study after study. The only psychologists that still maintain such positions are those who have a hidden agenda – usually a religious agenda, of a deeply homophobic attitude. Objective science has long since abandoned the idea that parenting styles has any significant influence on homosexual or transgendered orientations.

The most important emotional contribution any parent can make to their childrens' lives is to love them. Like most parents, you've done that, and continue to do so, or you wouldn't be here reading this. And now that you know about your child's orientation, they need your love and

support more than ever. That's what this web page is all about – helping you love your child and giving him or her the support he or she needs.

Who recruited my kid?

Nobody. Your child was gay from a surprisingly young age, and never made a conscious choice to be gay, so no-one *could* have recruited him or her.

It's tempting to go looking for scapegoats. This is a deeply emotional issue for parents, and one that brings out all the protective instincts in good parents.

It is impossible for anyone to recruit anybody to "be gay." The reason for this is simple – being gay isn't a *choice* anyone consciously makes.

Dr. Jack Weinberg, president of the American Psychiatric Association, said in a public statement on October 6, 1977, that fears of "catching" homosexuality or being "recruited" at school or elsewhere are " . . . utterly without scientific foundation."

Stop and ask yourself – when did you make a conscious decision to be heterosexual? To be attracted to only persons of the opposite sex? Of course you never did.

Can you pick and choose who excites you physically? Of course you can't. And neither can your child. Since he or she can't consciously decide who to be attracted to, being told that attractions to the same sex are wrong or evil can really be painful, because he or she can't prevent those feelings. They just happen. Over time, that guilt, fear and anger can build to create depression to the point of suicide.

As a parent, you need to be sensitive to the feelings of guilt and fear.

Your child is gay not because of anything you or anyone else did. While science can't explain precisely what causes homosexuality, leading researchers in the field have shown that both genetics and environmental influences play a part (see the bibliography section for more information).

What about the law?

The laws of just under half of the states in the United States criminalize gay sex to some extent. No laws prohibit the mere status of homosexuality (as is the case in some countries). About half of all other countries criminalize gay sex. Even though the criminalization varies from non-existent all the way to felony, these laws are rarely enforced.

That doesn't mean they are benign, They are often used as an excuse to discriminate. Lesbians and particularly gay men are often told things like, "We don't rent property to unconvicted felons!" Such a declaration can be rather hurting to a young couple looking for an apartment. The same excuse is used to deny employment, service in restaurants, rooms in motels, etc. So these laws are used for evil purposes, even if they aren't enforced. This is why the bigots stubbornly oppose the repeal of these laws, even though they know they aren't being used to put gay people in jail.

As a parent, you should know if anyone does, that your child is fundamentally the good person you raised him or her to be. He or she does not deserve such treatment. For this reason, it is your responsibility to your child to work

for the repeal of such laws, and see to it that this kind of discrimination is ended.

Should we tell the family? What about the neighbors?

The decision to tell anyone else really belongs with your child. He or she has an enormous investment in many relationships that could be damaged or destroyed by such revelations, and for his or her own psychological well-being, it is important for him or her to be in control of who is told.

This is often difficult for a parent to realize, but it can often be extremely difficult for a child to tell someone he or she has known most or all of his or her life about such matters, when the very real chance exists that the person being told will reject him or her and refuse any further contact.

Another consideration is the fact that the child may have more experience in dealing with the issue of prejudice and discrimination than you may realize. He or she may have been out to trusted friends for years before you were told. And in so doing, your child may have learned far more about how to handle this kind of revelation than you may suspect.

You cannot make your child be honest, particularly when the consequences can be as devastating as outright rejection. Your child will grow far stronger morally if he or she does this on his or her own, or you make the revelation with his or her permission, than if you simply tell others without asking.

But I want some *objective* information!

Here's what the *American Psychological Association says about homosexuality,* and some of the current scientific understandings of what it's all about.

The American Psychiatric Association, the American Medical Association and numerous other professional medical and mental health groups have all issued statements to the effect that homosexuality is a normal human variation, and should not be stigmatized or discriminated against. Here's the statement of the *American Psychiatric Association:*

For those looking for scientific information . . .

In May of 1994 (page 44), **Scientific American** published a pair of articles on the origins of homosexuality. These discuss the genetic differences that have been noticed in some gay men, as well as the anatomical differences that have been noticed in certain brain structures in gay men. The articles discuss some of the research that has been done on the subject.

The premier book on the subject is probably "The Science of Desire: The Search for the Gay Gene and the Biology of Behavior" by Dean Hamer and Peter Copeland. It discusses in great detail not only their own research, but that of others, and discusses both the strengths and weaknesses of that research.

Another book is "Evidence for a Biological Influence in Male Homosexuality," by Simon LeVay and Dean H. Hamer. It discusses two pieces of evidence, a structure within the human brain and a genetic link, which point to a biological component for male homosexuality.

There are many more books which touch on this subject, some of which are listed in the bibliography section of this web page.

But the bible says this is a terrible sin!

Not so fast . . . Biblical scholars aren't quite so quick to rush to judgement as are many local preachers and televangelists. Here's what the bible *experts* have to say.

The whole tone of the *bible on the subject of homosexuality* has been misconstrued. The ancients weren't anywhere near as concerned about it as modem interpreters imagine. This link will give you an overview of what the ancient writers of scripture really had in mind.

About Sodom and Gommorah . . .

The prophet Ezekiel discusses at some length the sins of Sodom, and makes it clear that the sin of sodom wasn't homosexuality, it was inhospitality towards travelers from the desert (Ezek. 16:48-50). That this was the interpretation of the destruction of Sodom and Gomorrah held by Jesus is clear (Matthew 10:14-15, Mark 6:11, Luke 10:11-12); in using Sodom as an example in these scriptures, Jesus is making reference to the interpretation of the event by Ezekiel. Some versions of the bible even have Jesus quote Ezekiel in this context.

An excellent book on this whole topic is **"What The Bible *Really* Says About Homosexuality"**, by Daniel A. Helminiak, PhD. (ordering information in the bibliography section)

Check the bibliography for others, and if you're *really* interested, check *the bibliography on the bible and homosexuality.*

Gay people in the bible

Gay people see themselves portrayed positively in several places in the bible. In the Old Testament, the entire book of Ruth is one of the most beautiful stories of love between two women that has ever been written. How ironic it is that many passages from this beautiful scripture have been used over the years in heterosexual marriage ceremonies!

The story of David and Johnathan in the book of I Samuel is also a beautiful gay love story (1 Samuel 19:1 through 23:29). In it, each shows the committment and sacrifice for each other that every gay couple has experienced and can instantly recognize.

Even Jesus was unquestionably aware of homosexuality, and yet there is no record that he ever condemned it. In at least one instance, he praised the faith of a gay man! In the original Greek version of the beautiful story of Jesus healing the centurion's servant (Matthew 8:5-13, Luke 7:2-10), the words used to describe the centurion's companion isn't "servant" at all. They translate accurately as "beloved boy," a phrase that clearly connotes the common practice at the time of older gay men or gay men in positions of authority keeping younger men as their lovers and partners.

But isn't homosexuality an unnatural perversion?

Homosexuality is a normal part of human behavior, apparently biological in origin, and can't be changed. It appears with about the same frequency in all cultures. Homosexuality is more about *love* than it is about sex.

The hatemongers out there would love to have us believe that homosexuals are all perverted sex addicts, out to destroy every vestige of family life and childhood innocence. The reality is quite different.

Being gay isn't about sex as much as it is about love. Being gay means *loving* persons of the same sex. For most gay men and lesbians, sex is an adjunct to love, just like it is for most heterosexuals.

Why should *love* between two consenting persons be considered wrong?

Read *Jerry Albrent's story* of his love for his partner, and his grief at his loss. It is a very moving story.

Simply being gay does not mean there is an overwhelming drive to have sex as often as possible, nor is there any drive to have sex with children or with the unwilling. Such notions come from another age, when nothing was known about homosexuality other than rumor and stereotypes. Yet it is surprising how often those notions are still presented as fact.

A few years ago, the American Psychological Association undertook a study to find out just how common pedophilia is among gay men. The results of the study indicated that it was actually less common among gay men than among hetersexual [sic] men matched for age and background. The result was so startling that they redesigned the study and

did it again – with the same result! So it's true! Gay men are not any more likely to be pedophiles than are heterosexual men!

Homosexuality is quite natural, too. It is cross-cultural, meaning that it appears with about the same frequency in all cultures. How those cultures handle it, of course varies substantially. Many Native American cultures celebrated it – and considered it a great spiritual gift, even making great spiritual leaders of their gay men. Even today, there are many cultures around the world where it is considered quite normal and natural.

Our response to homosexuality and transgenderism in this culture is the result simply of cultural influences. Many other cultures, greatly admired by our own (such as the ancient Greeks for example), were highly supportive of their gay, lesbian and transgendered members. Our own discrimination against the homosexuals in our midst says more about us than about others!

I have no problem with my child being gay. It doesn't matter to me!

Are you sure? Here are some questions to ask yourself. If you answer them honestly, it will reveal to you just how accepting you *really* are.

- **Are you uncomfortable around your child's partner?** This says a whole lot about your acceptance of your child's homosexuality. If you are uncomfortable with your child's partner, stop and ask yourself *why* you are uncomfortable. If the partner were of the opposite sex, would you be comfortable with him or her? Now, be honest – if you would be comfortable around

that same person if he or she were of the opposite sex, you aren't quite so accepting, are you?

- **Does your child's openness bother you?** If your child wears rainbow jewelry or has a bumper sticker on his or her car? Are you embarrassed to be around that kind of display? Figure she or he is "flaunting" it? Consider the constant "flaunting" heterosexuals do – holding hands and even kissing in public, the advertising for bluejeans, perfume, gift items and a thousand other things. In your child's eyes, that's flaunting, but it doesn't seem that way to you. So try to see yourself through your child's perspective – and realize that "flaunting" to you is simply being open to him or her. Do you try to keep your hetersexuality [sic] a secret? Of course not. So why do you think your child should be asked to keep his or her homosexuality a secret? If that still bothers you, maybe you *do* have a problem with your child's homosexuality

- **Do you find the thought of your child actually marrying his or her partner to be abhorrent?** This one's a biggie. More than 70 percent of the U.S. population is opposed to the idea of gay marriage. And that's mostly because of the nonsensical ideas about marriage they have – families are for raising children, etc. Well, the reality is that we all marry because we are in love or think we are. Should your child be denied the opportunity to marry the informed, consenting adult of his or her choice? When Denmark began allowing a form of gay marriage in 1989, most of the population was opposed. Now, most of it is in favor, overwhelmingly, in fact, including 89% of the church clergy that originally opposed it. Why the dramatic change in attitude? Because

it has proven to be such a *good* thing – just like heterosexual marriage!

- **Are you having trouble with the idea of gay sex?** Consider that most of the sexual practices engaged in by gay couples are also sexual practices of many hetersexual [sic] couples. If that doesn't bother you just as much, maybe you ought to think about the difference for a minute. Is there any? If you consider there to be a difference, then that indicates you have a problem with homosexuality itself.

- **Are you bothered by the words "homosexual," "gay," "lesbian," or "queer?"** If so, stop and think about why. It is probably because they have some bad connotations in your mind. Where did those connotations come from? Do they apply to your child? Your child is the same as most other gay persons – so why the evil connotations?

Being supportive of your child requires accepting your child fully. If you answered yes to any of the questions above, then you've flunked the acceptance test and have got some homework to do. Your assignment is to check out *PFLAG,* an organization set up with the idea that parents who've been where you are now are the best people to help you understand what your child's homosexuality is really all about.

What on earth is going on in my child's mind?

If your child came out to you voluntarily, it might surprise you to learn some of the matters your child considered before coming out to you.

If you'd like to understand some of the questions your child asked him/herself, read *Justin's Letter to a Friend.* It is a really touching letter written by a gay youth to a friend to help him understand who he is.

If your child came out voluntarily, your child had a lot to consider before coming out to you. If you'd like to gain some insight into what your child was considering, read *What You Should Know Before You Come Out To Your Parents,* a brochure written by the parents of gay children who have already been where you are now.

A book has been written that has been written specifically to help you understand what has been going on in your child's mind. "Homosexuality: The Secret a Child Dare Not Tell" by Mary Ann Cantwell (San Rafael, CA: Rafael Press, 1996) tells the story of her own son's coming out to her, her realization of the pain he had suffered, and her study of the pain and fear that children suffer trying to keep their homosexuality a secret. It is important for you to understand how painful this has been for your child, and how difficult it has been to keep this secret.

Even now, now that your child has come out to you, your child is justifiably frightened about how you will react in the long run. Your child is no doubt aware that approximately one in four teens in the United States who come out to their parents end up dispossessed and living on the streets, surviving usually by selling drugs or their bodies. A large percentage of these young people don't survive long enough to register to vote. If your child is still a teen, he or she doubtless has at least some fear of this happening.

It is *vitally important* that you assure your child that he/she will not be disowned or dispossessed by you, because your child is more important to you than your fears

or prejudices could ever be. Make this clear – and give him or her a hug! Let them know you still love him or her as much as ever!

Can my child be cured of homosexuality?

Lots of people promise "cures," but none can deliver.

There are lots of groups and individuals around who will promise you that they can "cure" your child of homosexuality. The fact is, they can't.

The American Psychiatric Association has looked into the issue of so-called "reparative therapy" and "conversion therapy." The result was their *statement on homosexuality.* Though carefully worded to avoid controversy, it makes no bones about the fact that such therapies have not been shown to be particularly effective, and can actually be harmful. The *draft statement,* stubbornly opposed and eventually defeated in convention by a small but very vocal minority of fundamentalist Christian psychiatrists, is much more strongly worded.

Because homosexuality is such a deeply ingrained, even biological aspect of your child's being and identity as a human, no one, no matter how sincere, can change it. It's like trying to change hair color or handedness.

Scientists who have studied this issue say that claims of a "cure" don't stand up to scruitiny [sic]. The few studies claiming success have been shown to be fatally flawed. Usually the sampling of "cured" homosexuals is flawed or those claiming a "cure" really aren't "cured" when questioned closely.

There are a number of Christian groups around, most of them associated with particular sects, who claim to be able

to "cure" homosexuality. What they really succeed in doing is to merely repress it. Repressing sexuality usually makes it come out in another form. Witness the problems the Catholic church is having with pedophilia among its priests. So attempting to repress your child's sexual orientation in this way is only asking for trouble later on.

There are a number of therapists, mostly psychiatrists, who claim to be able to "cure" homosexuality. Again, the studies they point to invariably turn out to be fatally flawed. Steer well clear of any therapist who makes such a claim. The problems that can be created by attempts to cure homosexuality can last a lifetime, and can be scarring, even debilitating, as this *letter on conversion therapy by a psychiatrist to his professional association* makes clear. It describes his experience in dealing with reparative therapies, and the results of such misguided attempts to change a basic behavior.

Here is the story by *Liz Armstrong* about how her son tried to cure himself.

The reason I use quotes in talking about a "cure" is that it implies a disease state. I, for one (and I think the American Psychological Association, the American Medical Association and the American Psychiatric Association will all back me up on this) feel it is *not* a disease. It is merely another variation in the diversity of humanity that makes us all so unique.

My child couldn't *possibly* be gay. He doesn't fit the image!

Don't count on it. You'd be *surprised* at who's gay!

It's a common saying in the gay community that if all the faces of gays in church on sunday suddenly turned purple, you'd be amazed at all the purple faces around you! On and off the pulpit! People you never suspect – accountants, welders, ranchers, doctors, mechanics, lawyers and even conservative politicians!

Many gay people live "in the closet" all their lives and never tell anyone except their lovers.

What a tragedy! Their families never know them, their co-workers and colleages [sic] never really get to know who they are. Friendships are based on a lie. Trust and acceptance are a function of deceit.

Read *Nancy Lampkin Olsen's story* of her son's coming out, and how it has affected their relationship. Now that gay people are coming out of the closet, the old stereotypes are slowly breaking down. People are discovering that people they had known all their lives are gay, whom they had never suspected. Read *Laura Siegel's story* and learn how she has become a champion for her son.

Does this mean my child is going to be wildly flamboyant, offending everyone I know?

Not neccessarily. The vast majority of gay persons live lives indistinguishable from anyone else except for who they come home to. Learn here about their lives. Even if your child *is* flamboyant, don't you still love him or her? Of course you do.

Diversity is what flavors our culture and gives it richness and beauty. Your gay child may or may not be flamboyant, screaming to the world about what makes him/her different. Of course you wouldn't want to dress or behave like

that, but your child is a soverign [sic] person who has the right to express him/herself. As a parent, sometimes you just have to step aside and let them do "their own thing." As long as no one else gets hurt . . .

But chances are, your child is just like every other kid on the block. He or she probably runs around with the same crowd as all the other kids, enjoys pizza and hamburgers, and goes to the same school activities as all the other kids.

The point is, that whatever your child is now, don't expect that to change. Your child is the same person he or she always was, and your new understanding of him or her won't change that. If you are a good parent, however, your understanding of your child's sexual orientation should actually help improve your relationship to each other and closeness as a family. Whether that happens or not depends on you. This new revelation can be a starting point for a whole new level of parent child interaction and closeness, or it can be a point of contention and arguement. It all depends on how accepting you choose to be.

This is awful! It means my kid's going to live a lonely, miserable life!

You'll be surprised! Most gay and lesbian youth grow up to be as well adjusted and happy and emotionally fulfulled [sic] as anyone. Most have successful careers and happy family lives. Read some of their stories in the books discussed below.

There are many books about the lives of gay, lesbian and transgendered people.

A really wonderful book about a successful gay couple is "Straight from the Heart," by Bob and Rod Paris-Jackson,

a pair of champion weightlifters who met in a gym and fell in love and made a life together. It is a really touching story.

"Stranger at the Gate" is an autobiography by Mel White, a former speechwriter for Pat Robertson, and a very successful Christian film maker.

"Coming Out Conservative" is the autobiography of Marvin Leibman, who was one of the founders of the modem Conservative political movement. It is the story of his life before and after coming out to his peers.

"Uncommon Heros" by Samuel Bernstein and edited by Phillip Sherman is a book about the lives of dozens of highly successful gay persons who have made a significant difference in the communities in which they live. There's no reason your child couldn't be just as successful.

But I'll never have any grandchildren!

Don't count your gay child out! Many options are available to gay, lesbian and transgendered people for raising children, both their own and children they adopt. If your gay child wants children, he or she can have them, and that makes *you a grandparent!*

The options for lesbian couples

They include artificial insemination and adoption. In most states, sexual orientation is no longer a barrier to either option.

Artificial insemination is an option practiced with increasing frequency. Many lesbian couples seek sperm donation from men, often gay men, who they admire and respect

and are close to, and who they would like their children to emulate. Of course being asked is quite an honor for the biological father. Many other couples choose to seek sperm from an anonymous donor from a sperm bank.

The options for gay men

Gay men often come to a gay marriage with child from a failed attempt at a heterosexual relationship. When this happens, both partners usually raise the child as their own, both showing equal commitment to the child.

Childless gay male couples have the option of either adopting or surrogate mothering, often by lesbian couples who perform this service out of love for the gay men who are part of their community. This is happening with increasing frequency. The surrogate mother is inseminated either with the gay man's sperm or with an anonymous donor's sperm.

The adoption possibilities

Child welfare agencies, even when they are homophobic, realize that placing a child in the home of a gay or lesbian couple has to be more nurturing for the child than an endless succession of foster homes or life on the streets. So many, if not most states now allow lesbian couples to adopt children. Nearly all states allow lesbian couples to act as foster parents.

Currently, there are only a handful of states where gay or lesbian couples are precluded by law from adopting or fostering children. A surprising number of gay men and lesbians have children from previous attempts at heterosexual relationships and marriages. In many cases, failed

marriages result in the gay spouse having custody of the children. It's a tough way to get a grandchild, and I wouldn't recommend it to anyone, but it does happen with surprising frequency. The courts in many states now allow gay partners to adopt the children of their gay spouses when it can be shown to be in the best interests of the child. It's not unlikely that your child will become a partner in such a relationship.

I'm desperate to *talk* to somebody!

You're in luck! There is a wonderful, loving support organization for people in just your situation, and there's most likely a chapter near you.

Parents, Families and Friends of Lesbians and Gays, known as PFLAG, is an organization that was put together by parents who have been through what you are going through, for the purpose of supporting parents and family members in just your situation. Here is a list of local *PFLAG chapters* numbering nearly 400 at last count, so there's probably one near you.

If there isn't (or even if there is), consider joining PFLAG's unofficial "*virtual chapter*" here on the Internet.

There's no substitute for talking things over with a parent whose been there before you. PFLAG will go a long way towards easing your fears and addressing your concerns. Give it a try!

What about AIDS?

This is the bad news. But there's hope.

Here are some grim statistics (for 1999) from the Center for Disease Control, the U.S. government's primary public health agency dealing with this epidemic: Adolescent gay men are infected with the virus at a rate approximately three times that of the straight population (though heterosexuals are catching up fast). In urban areas of the United States, between 5 and 8 percent of all adolescents are infected with the virus that causes AIDS. And AIDS is now the leading cause of death of young men between the ages of 25 and 44. It beats out cancer, traffic accidents, handgun violence and all other infectious diseases.

Your child doesn't have to be part of this grim reality. Here's what you can do to prevent it:

- **Rule number one: DON'T NAG.** Your child has heard it all before, believe me. You aren't the first to raise this issue with him or her, and believe it or not, you won't be the last. It's OK to express your concern, but don't keep bringing it up. You'll only make it sound like you're covertly trying to "cure" him or her of homosexuality. That is a surefire way to lose influence.

- **Know the facts yourself.** The best way to know what your talking about is to visit one of the many safe sex pages on the web, and just look around, even if you are uncomfortable with it. You've gotta know the facts if you want to have any credibility with your son or daughter. I'd suggest you check out the *safer sex page*. A safer sex page is available in *Spanish* if that is easier for you to read. The best place I've found on the net for information on HIV/AIDS is the *Virtual Library AIDS Page*. It has dozens of links! Another great place is *Critpath.Org*.

- **Be honest at all times when discussing this issue.** Don't try to be the expert if you're not absolutely certain of what you're talking about. If you're ignorant of the answer to a question your child asks, don't be afraid to admit it. Doing so will build credibility with your child, and trying to be the expert when you're not will destroy credibility faster than anything. Remember, this situation is much more personal to your child than it is to you, and he or she has probably been collecting information that will enable him or her to detect ignorance on your part.

- **Be supportive.** This is the flip-side of rule number one. Let your child know you love him and want his or happiness as much as your own, but **not in the context of moralizing** (that's just nagging again). Encourage long-term, monogamous relationships. With teens, admittedly, this is hard to do. Gay teen males especially love to "sleep around" and "sample the goods" and "see what's out there." Many are actually sexually attracted to members of high-risk groups. But if you encourage long-term relationships with quality partners, not only will you be fostering their emotional growth, you'll be reducing significantly the chances of their becoming HIV infected.

- **Don't forbid.** The words "I forbid you to . . . " is a surefire guarantee your son or daughter will do it anyway, particularly if he or she is still adolescent. Your child will almost certainly have sex, whether you want him or her to or not, and forbidding them to do so will only alienate him or her. Your child is smart enough to know that no one gets pregnant from homosexual sex, and that, in his or her mind, is the number one reason for not having sex in the first place. I

guarantee you that if your child is adolescent, your child figures he or she is immortal and the AIDS epidemic only applies to old, fossilized perverts. The way to break down this kind of thinking is to know the facts and, without nagging, encourage the behaviors that allow them to grow emotionally without putting themselves at risk. You can do that by being knowlegable [sic] and earning respect rather than demanding it.

- **Get involved.** Getting involved in your local AIDS care project and encouraging your child to help is the best possible way to educate him or her. By setting this kind of example, your child will quickly learn that you take this really seriously. And by teaching your child to volunteer, you will contribute greatly to his or her self-esteem, which is a primary prerequisite to self control in this epidemic. If your child meets real AIDS patients, he or she will quickly learn that this thing is real, and that he or she is vulnerable, especially when he or she meets young people near his or her age. It will do more to break down the "I'm immortal" mindset than anything else you can do. Yes, it takes time, effort and commitment, but isn't your child worth it?

- **Encourage Sex Education in the public schools.** Yes, this is very controversial. But the statistics by the Centers for Disease Control, the National Institutes of Health, the World Health Organization and many others show very clearly that thorough, frank sex education significantly delays the onset of sexual activity and promotes the use of condoms when sexual activity does begin to occur. Where sex education is the most thorough, both teenage pregnancies and sexually transmitted diseases among adolescents are significantly lower. For

example, in the Netherlands, where sex education begins early and is a constant through the public educational process, the teen pregnancy rate is one *fifth* the rate in Utah, where there is no meaningful sex education in the public schools. The message couldn't be clearer. Sex education is needed in the public schools, and could do a lot to slow the spread of AIDS. Reason enough to support it.

Special help for the transgendered

Being transgendered creates a special set of unique problems for your child. Here are some resources.

First, it's really helpful to understand what being transgendered means. If you're a typical parent, you probably have lots of questions about your transgendered child you haven't any idea how to go about getting answered. Well, you're in luck! Here's an *FAQ (frequently asked questions) list* developed just for the parents of the transgendered by some PFLAG parents who've been where you are.

The kind folks at PFLAG have put together a *special place on the web* just for the transgendered. It has some really helpful stuff, and it's evolving all the time, so check it often.

Here is a great page of *resources and book reviews* just for the transgendered. It might help you to understand your child's mindset a bit better

For resources outside the U.S., an especially helpful directory is the *IFGE International Transgender Resource Directory.* It has tons of resources, especially European.

Are there some books I can read?

Yes. Tons of them. Here's a *list to help you get started*, and you can obtain them by simply following the links.

APPENDIX R

EXHIBIT 5

SILENCE
Organizing Manual

Days of Silence Project

WELCOME

Welcome to the Day of Silence Organizing Manual! On behalf of the Gay, Lesbian and Straight Education Network (GLSEN), the United States Student Association (USSA) and the thousands of students whose leadership and participation have created the Day of Silence project, we'd like to thank you for your interest and involvement. With your help, the Day of Silence will continue to flourish as the largest youth-run action on lesbian, gay, bisexual and transgender (LGBT) issues in the country.

We have filled this manual with many ideas and tips to make your Day of Silence as effective as possible. Here, you'll find information on everything from fundraising and publicity to the nuts-and-bolts of getting your classmates, teachers and administration on board. Getting your school's administration to support your effort is particularly critical for high school organizers, but we've also identified alternative ways to participate if administrative support isn't likely. Also, there's information targeted for both high school and university organizing efforts (though we've even heard about middle school students organizing for the Day!), as well as plenty of suggestions that work in both settings.

We encourage you to use this manual in whatever way works best for you – you may pull ideas from a single

section or take all in from cover to cover. The website, www.dayofsilence.org, is another useful resource. We also encourage you to bring your own ideas and creativity to the table so that your school's Day of Silence becomes something unique and works best for your particular school community.

Welcome aboard, and happy organizing!

The GLSEN Student Organizing Department

* * *

ACKNOWLEDGEMENTS

THE DAY OF SILENCE PROJECT
An official project of the Gay, Lesbian and Straight Education Network (GLSEN), in partnership with the United States Student Association (USSA).

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For additional support and resources, please email us at info@daysofsilence.org.

FOR HIGH SCHOOL ORGANIZING CONTACT:

The Day of Silence Project – GLSEN
90 Broad Street 2nd Floor
New York, NY 10004
(212) 727-0135 x 134
(212) 727-0254 (fax)
glsen@glsen.org
www.glsen.org

FOR COLLEGE & UNIVERSITY ORGANIZING CONTACT:

LGBT Student Empowerment Project – USSA
1413 K Street N.W., 9th Floor
Washington, D.C. 20005
(202) 347-8772
(202) 393-5886 (fax)
lgbt@usstudents.org
www.usstudents.org

The experience, insight and leadership of the following leaders and supporters have contributed to the success of the project over the years.

Jessie Gilliam, National Day of Silence co-founder, Coordinator 1997-1999
Maria Pulzetti, Day of Silence founder, Coordinator 1996-1997
Chloe Pafenchar, Day of Silence Project Coordinator 1998-2001
Caeden Dempsey, LGBT Student Empowerment Project Director, USSA
Myles Gideon, Student Pride Associate 1999-2001
Caleb Baker, Student and Web Designer
Jason Riggs, Queer Organizer
Candice Gingrich, National Coming Out Day Project Manager, HRC
Josh Freker, American Civil Liberties Union
United States Student Association, www.ussa.org
The Midwest Academy, www.midwestacadmey.com
Parents, Friends & Families of Lesbians and Gays (PFLAG), www.pflag.org

ORGANIZATIONAL ENDORSEMENTS

Please visit the Day of Silence Project online @ www.dayofsilence.org for an up-to-date list of endorsing organizations.

ADDITIONAL RESOURCES

The following documents are available on the Day of Silence website: www.dayofsilence.org. You can read them and adapt them, or even download the flyer, card and sticker for use in your own publicity strategy.

- Sample Strategy Chart
- Frequently Asked Questions
- Sample Press Release
- Sample Email for Recruiting Participants
- Sample Letter to Potential Ally Organizations
- Sample Letter to School Administration
- Sample Letter to Local Businesses
- Sample Guidelines for Participants
- Sample Flyer
- Sample "Speaking Card"
- Sample Sticker

INTRODUCTION

- What is the Day of Silence Project?
- What can the Day of Silence do?
- Why Silence as a Tactic?
- History of the Day of Silence Project

WHAT IS THE DAY OF SILENCE PROJECT?

The Day of Silence is a day on which those people who support creating safe schools for LGBT people take a nine-hour vow of silence to recognize and protest the harassment, prejudice and discrimination – in effect, the silencing – that LGBT people face. Instead of speaking, high school and university participants hand out cards or wear stickers or t-shirts printed with the following message:

"Please understand my reasons for not speaking today. I am participating in the Day of Silence, a national youth movement protesting the silence faced by lesbian, gay, bisexual and transgender people, and their allies. My deliberate silence echoes that silence, which is caused by harassment, prejudice and discrimination. I believe that ending the silence is the first step toward fighting these injustices. Think about the voices you are not hearing today. What are you going to do to end the silence?"

But the Day of Silence Project is about more than being silent for a day. It's about raising awareness around LGBT issues, making a visible personal commitment to justice and equality, and, potentially, organizing a larger campaign to promote safety and respect in your school and community.

WHAT CAN THE DAY OF SILENCE DO?

The Day of Silence can be used as a tool to affect positive change – both personally and community-wide – that lasts far beyond the nine hours of the event. Depending on where you are, the makeup of your student body, the relationships between students and faculty, and other factors, the climate in your school on LGBT issues could be incredibly hostile, incredibly welcoming or somewhere in between. Students might be forced to hide their sexual orientation, gender identity or gender expression because they fear physical or verbal harassment. They might be made invisible by school curriculum that makes no mention of LGBT people and events. Or your school might simply be a place where students, teachers and staff could

learn more about diversity and acceptance. Regardless of what situation you find yourself in, the Day of Silence is an effort that can raise awareness on these issues, prompting people to talk and think about them.

It can also be a way for your group to position itself to create more long-lasting positive changes (and it is for this reason that we've included a full section on direct action organizing. If your school lacks a nondiscrimination or anti-harassment policy that makes mention of sexual orientation or gender identity, the Day of Silence could be a springboard for a wider campaign to create more inclusive policy. Or, if you want to get more LGBT history books into your library, you could position the Day of Silence as a strategy to demand greater inclusiveness.

> "TODAY I PARTICIPATED in the Day of Silence, and I didn't think that something that only endured that brief of a period of time, and an absence of something, no less, could impact me this much, causing me to reevaluate the way I have learned to express myself."
>
> –Elizabeth, Indiana Academy 1998

WHY SILENCE AS A TACTIC?

The Day of Silence enables participants to show, in a highly visible way, everyone they encounter, that they support LGBT rights. At the same time, it provides a space for personal reflection about the consequences of being silent and silenced, bolstering an inner determination to speak up. The Day of Silence moves the power of these personal experiences to a community-focused effort. It compels us to consider how we can make our own voices stronger and begin to stop silencing ourselves. By taking

silence, a tool that traditionally has been used to deprive people of their voice and power, and turning it into an intentional group activity, participants in the Day of Silence truly make a powerful statement of resistance.

HISTORY OF THE DAY OF SILENCE PROJECT

1996

THE DAY OF SILENCE IS BORN.

Students organized the first Day of Silence at the University of Virginia. With over 150 students participating, those involved felt it was a great success. The Day of Silence received extensive local press coverage and a positive response from UVA community members, motivating then-18-year-old Maria Pulzetti to take the Day of Silence national.

1997

FROM ONE, TO ONE HUNDRED, NATIONAL DAY OF SILENCE TAKES OFF

With a web page and much dedication, Pulzetti and then-19-year-old Jessie Gilliam developed the effort to be used in schools across the country. It was renamed the National Day of Silence, and that year nearly 100 colleges and universities participated. Some schools in Australia heard about the action and modeled a similar day for Australian schools.

1998

THE DAY KEEPS GROWING, THE PROJECT BEGINS

Pulzetti and Gilliam realized they couldn't expand the National Day of Silence alone, so they organized a team of regional coordinators who could assist schools better by understanding and working with local networks. Expanding from a one-day vow of silence to include additional

actions and educational events, the Day of Silence Project was officially inaugurated. That year, for the first time in a recognized number, students in high schools joined the organizing efforts, helping double the number of participating schools to over 200.

1999-2001

MORE PEOPLE, MORE TIME, A MESSAGE OF UNITY SETS IN

Through the sponsorship of Advocates for Youth, Gilliam worked part-time over the summer of 1999 to maintain and expand the Day of Silence Project. For the first time in the project's history, a team of volunteers met for a weekend in Boston to discuss strategy and develop future plans towards assisting schools. The Day of Silence Project continued to support high schools, colleges and universities around the country with volunteers led by then-18-year-old Chloe Palenchar, the National Project Coordinator. Over 300 high schools participated that year.

2001-CURRENT

DAY OF SILENCE PROJECT; STILL GROWING, STILL STRONG

GLSEN National Student Organizer Chris Tuttle, Gilliam and Palenchar developed a proposal to provide the Day of Silence Project with new funding, staff, volunteers and an official organizational sponsor, GLSEN. To ensure its success, GLSEN developed a first-ever Day of Silence Project Advisory Board (which includes Pulzetti, Gilliam and Palenchar) to help build upon past successes, a Leadership Team of students to support high school organizers around the country, and a partnership with the United States Student Association, to ensure colleges and universities receive equal support for their organizing.

TOMORROW
THE POSSIBILITIES ARE ENDLESS

Just imagine: thousands of students, from San Francisco, California to Irmo, South Carolina, united in a visible silence to create real change in local schools. Whether used to educate classmates on the damaging effects of anti-LGBT bias, or to demand passage of a statewide nondiscriminatory act inclusive of LGBT people, the Day of Silence is an awesome opportunity to create more inclusive school environments and make some noise.

WHAT ARE YOU GOING TO DO TO END THE SILENCE

PARTICIPATING IN THE DAY OF SILENCE PROJECT

I. The Basics of Direct Action Organizing

II. The Day of Silence at Your School

III. How to Handle Roadblocks

IV. How to Build a Movement

I. THE BASICS OF DIRECT ACTION ORGANIZING

Some groups may wish to make the Day of Silence the centerpiece of a larger campaign to change their schools. Others may wish to maximize the interest and support generated by the Day of Silence by planning additional activities. This section provides an introduction to direct action organizing, a tool used by many student and community activists. Direct action organizing can help you to think about all of the people and factors that contribute to

decision-making in your school, and how your group can exert an influence on all of them.

UNDERSTANDING RELATIONS OF POWER

"Strong people don't need strong leaders." Fundamentally, Ella Baker's words speak to the power of direct action, grassroots organizing to involve not just one or two prominent leaders but large numbers of people in the community to bring about social change. Miss Baker, as she was known by students with whom she worked, was an organizer of the Civil Rights Movement who also advised a multi-racial group of students, the Student Non-violent Coordinating Committee (SNCC). The group organized lunch counter sit-ins, "freedom rides" in which white and black bus riders integrated commercial bus lines by riding them together, voter registration drives and "citizenship schools" in which Southern black people and others were educated about organizing, voting and power.

Organizing is our ability to change our communities: to identify problems and develop solutions, to bring **people** together, to plan strategies and campaigns, to hold elected officials and corporations accountable to the communities they serve. It is rooted in the power of people. Individuals working together as a group and/or community have the power to bring about change. Ella Baker's words do not say that leaders are not important; they do say that people are. Using organizing as a tool means that we need to be reaching out and involving as many people as possible to take small actions but sometimes big risks. Our teachers, fellow students, administrators, families, school boards and other community members need to understand our needs, concerns and, most importantly our voices and

power. The Day of Silence uses silence to demonstrate the importance of voices and our power to demand safer, more equitable schools. Success in organizing depends upon our ability to bring people together and to hear everyone's voice, the more diverse our voices, the more successful our work will be.

Organizing compels us to consider the power and privilege that certain groups of people and types of behavior hold in our communities. When we think of anti-LGBT bias in schools, we often think of name-calling, unsafe classrooms and hallways or exclusion of LGBT people and history from the curriculum. It's important to remember that people experience anti-LGBT harassment in schools most often because they do not fit expected gender roles, or because they are open about their sexuality. When "girls" act like "boys" or "boys" act like "girls," or when people are visible about their LGBT identities and relationships, some people perceive these transgressions of sexual orientation and gender "norms" as threatening to their own gender identity, sexuality, or entire worldview. That worldview often sees women, people of color, LGBT people, young people, poor people, and people with disabilities as having less value, and therefore less power. We need to move our thinking to the next level and recognize the broader and deeper connections between anti-LGBT bias and other oppressions.

Organizing helps us to recognize the role we can play in changing the power dynamics in our communities. To build safe schools, we need to educate people about gender and sexual orientation. At the same time, we need to build the skills and power of LGBT people and allies to speak and act in their local communities, in order to bring about meaningful change. The Day of Silence strengthens

individuals, as they realize their own power, and groups as they use their collective power to demand change.

LEARNING THE STEPS OF DIRECT ACTION ORGANIZING

Direct action organizing is based on some very simple ideas:

A. **Every problem has solutions.**

B. **A committed group of people who care have the power to make solutions happen.**

C. **And working together these people can alter relations of power.**

In order to get from point A to point B, the people in the group need to evaluate the situation surrounding the **problem**, by asking themselves the following ten questions.

1. WHAT IS THE PROBLEM?

As you know, the problem that the Day of Silence Project seeks to change is the silence faced by LGBT people and their allies. In every school and community, this silence may manifest itself in more specific **problems**, such as the lack of LGBT-inclusive nondiscrimination and anti-harassment policies, the exclusion of LGBT people and history from the curriculum, the absence of support and advocacy services for LGBT youth, the lack of consequences for name-calling and many other problems. A **problem** is simply the situation that is wrong or needs to be changed.

For example, a problem statement would be: "Anti-LGBT verbal harassment is pervasive in our school." Let's call that "Problem 1." Or, "LGBT students don't feel supported by the counseling staff at our college." That's "Problem 2."

2. WHAT ARE SOME POSSIBLE SOLUTIONS TO THE PROBLEM?

In direct action organizing, every group effort, or **campaign**, should focus on one **problem**, with the understanding that most **problems** contain, or are connected to, other **problems**. Once your group has identified the **problem** it wants to focus on, the next step is brainstorming possible solutions.

In order to brainstorm solutions, you need to think about why the **problem** exists, in specific terms. Continuing with problem 1, why is harassment tolerated? Sometimes, teachers don't intervene because they simply don't recognize harassment; they've internalized the idea that bullying and teasing, or being bullied and teased, is just part of growing up. Sometimes, LGBT teachers who aren't "out" in school are afraid to intervene out of concern for their own safety and job security. Most of the time, teachers don't intervene because they don't know how; perhaps there's no official school policy regarding anti-LGBT harassment and how to respond to it, or, if there is, teachers haven't been trained in how to follow it.

Now, think about solutions that might address these problems. What would really improve the situation? Continuing with Problem 1, training all teachers in how to respond to harassment might help to solve the **problem.** Passing an anti-harassment policy that includes protection

for students based on their sexual orientation or gender identity/expression might help to solve the **problem**. Creating a standard disciplinary procedure for harassment, and making sure that everyone in the school knows about it, might help to solve the **problem.**

> "DURING MY SILENCE people responded in completely different ways. One person stopped me, and thanked me for what I was doing for all the people who weren't able to. Another person told me that I was a pitiful excuse for a human being. I decided that the thank you was what was really important."

Considering Problem 2, why might LGBT students feel unsupported by counselors? Perhaps the college hasn't made training in LGBT student support a job requirement or preference in hiring counselors. Perhaps there is a perception among college administrators that there aren't enough LGBT students to warrant hiring someone who specializes in supporting LGBT students, or taking the time or money to train the existing counselors.

Now, think about solutions that might address these problems. What would really improve the situation? Passing a hiring policy that requires counselors to have training in LGBT student support might help to solve the **problem.** Holding mandatory annual trainings in LGBT student support for existing counseling staff might help to solve the **problem**. Officially including LGBT student support in the list of counseling services offered by the college night help to solve the **problem**.

All of the potential solutions are known as issues, or demands. A campaign that works to achieve an issue is

known as, you guessed it, an issue campaign. Issue campaigns are the engine that drives direct action organizing.

3. WHICH SOLUTION WILL YOU PURSUE? WHY?

Of course, all of the possible solutions, working in harmony, would be ideal. But for the purposes of your **campaign**, you should pick one solution to pursue. This means that you should pick the solution that has the greatest potential to solve multiple **problems**, while at the same time recognizing that every solution you brainstorm might still only partially solve the **problem**.

One of the most important criteria for choosing an **issue** is that it be worthwhile. People should feel that they are fighting for something they feel good about, and something that merits the effort. Think about how the following criteria contribute to the worthiness of your **issue**. If your **issue** can achieve as many of the following results as possible, you probably have a very worthwhile **issue.**

> **Result in a Real Improvement to People's Lives.** If you can see and feel the improvement, then you can be sure that it has actually been won.
>
> **Give People a Sense of Their Own Power.** Your group and supporters should feel that the victory was won directly by them. They should feel that they have the power to effect change, to be heard and to be taken seriously by the rest of your school community, especially those in authority.

After the Relations of Power. Building a strong group creates a new power dynamic: in other words, the needs and concerns of your group are more likely to be consistently taken into account, rather than taken for granted, by others with power. This is because you've shown people that you have the ability to mobilize support and resources.

Be Winnable. The **problem** should not be so large or the solution so remote that your group gets overwhelmed. Your group's members should be able to see from the start that there is a good chance of winning or at least that there is a good strategy for winning. (Do we ever fight for unwinnable issues? Yes. We do work to end **problems** that seem to have no end, but we always try to break them down into winnable **issues**, even if the victory is small compared to the whole **problem**.)

Be Widely Felt. It's helpful if many people in your school community feel that this is a real **problem**, and agree with the solution. If your school is unsupportive of the needs of LGBT students, however, then what's more important is that the people in your group agree about the problem and the solution. That way, even if you're fighting an uphill battle, you'll be unified in doing so.

Be Deeply Felt. People should not only agree, but also feel strongly enough to do something about it. If many people agree about the **issue** but don't feel strongly, it will be difficult for you to generate the enthusiasm and commitment needed to fuel your work. It's important to note that what is widely and deeply felt changes over time. Sometimes there needs to be a period of

education before people can truly decide where they stand on an **issue**.

Be Easy to Understand. A strong **issue** should not require a lengthy and difficult explanation. The test: a flyer should be able to explain the **issue** in one paragraph.

Have a Clear Target. The target, or **decision-maker**, is the person who has the power to give you what you want. If you can't figure out who the target is, you need to do some more research before pursuing your **issue.**

Have a Clear Time Frame that Works for You. An **issue campaign** has a beginning, a middle, and an end. With a strong **issue**, the critical times in the **campaign** can be controlled so that they come when you can mobilize the most support.

Be Non-Divisive. Pick unifying **issues**. Avoid **issues** that divide supporters who should be working together. Don't pit friend against friend, teacher against student, identity/affinity group against identity/affinity group.

Build Leadership and Membership. People should be able to contribute to your work at various levels of involvement and leadership. In addition, your **issue** should lead your group forward in its work, rather than leading you into a rut, which could cause you to lose members and supporters.

Set You Up for the Next issue. Issues are like playing pool – each shot has set you up for the next one. In addition to thinking about future issues directions, consider the skills the group

will develop in the **campaign** and the contacts it will make for the next one.

Be Consistent with Your Vision. The **issues** you choose to work on should reflect your vision for an improved school community.

4. WHO HAS THE POWER TO GIVE US WHAT WE WANT?

Continuing with the previous examples, your local school board, district administration or school administration may have the power to approve mandatory teacher training. Your college administration, or the Department of Student Services, may have the power to approve counselor training. But it's not enough to know the name of the public body or office that has the power to implement your solution. People, not institutions or boards, make decisions. **The actual people who have the power to make the decision, such as a specific school board member, school principal or college Dean, are the people you need to influence.** If you can't figure out who the person with the power is, you either need to do more research, or you really don't have an **issue**, since there is no solution to a problem if there is no one with the power to solve it. The person with the power to give you what you want is known as the **decision-maker**. The **decision-maker** becomes the target of your **issue campaign.**

5. WHO IS LIKELY TO SUPPORT OUR SOLUTION? WHY?

A small but deeply committed group of people (like you!) needs to care about the issue enough to stick with it in

order to see it through. Even more importantly, a larger number of people need to care about the **issue** enough to support it and work on it over the long term, if necessary.

Your group should begin by brainstorming a list of all of the people who are directly affected by the **problem**. Start with yourselves, and then branch outward. Returning to Problem 1, who is affected by anti-LGBT harassment in your school and the teacher's lack of response to it? Everyone, you could argue, because it affects the entire school climate; at this point, however, you should be more specific. Make a list of the people in your group, any other "out" LGBT students, and your friends. Add to your list "out" LGBT teachers, teachers who already respond to harassment, and teachers with whom you have good relationships. Add supportive administrators and staff. Add family members and community members. These people are all directly affected by the **problem**, either because they get harassed or people they care about get harassed. In Direct Action Organizing, your supporters are known as your **constituents** and **allies**.

The question to ask yourselves now is: Would these people support this issue, our proposed solution **to the problem?** The answer to your question should be **"YES."** If the answer is "Maybe" or "I Don't Know," you should take the time to ask people how much they care about your issue before you commit to working on it. Ask if they'd be willing to attend a meeting about the issue, if they'd be willing to make phone calls, if they'd be willing to get their friends and family to write letters. **Never assume support, and never assume opposition. The only way to know what people think is to ask them.**

If the answer to the above question is NO, think about how you can reframe your **issue** without compromising it, so that people would support it. This is known as "cutting" an **issue**. Returning to Problem 2, let's say that your **issue** is "The college should sponsor mandatory annual trainings in LGBT student support for existing counseling staff." If your fairly certain that a mandatory training won't be supported, you could instead propose a voluntary training. Or, you could make the acquisition of LGBT support resources for the counselors' offices your issue.

6. WHO IS LIKELY TO STAND IN THE WAY OF OUR SOLUTION? WHY?

Next, your group should brainstorm a list of all of the people who are likely to stand in your way. This list should include teachers, counselors and administrators who've denied you their support in the past, or who've expressed bias against LGBT people. It should include peers, relatives, school board members and people in the community who have shown intolerance of LGBT people, or opposition to initiatives supporting LGBT students. The people who oppose your issue are known as, you guessed it, your **opponents**.

7. WHOSE OPINION ARE WE NOT SURE ABOUT? WHY?

Remember, the best way to learn people's opinions is to ask them. Just because you don't know someone's opinion doesn't mean they don't have one. You should always begin by asking; it may seem like a lot of work, but it actually will save you time and energy later on.

There is another group of people, however, and that's the people in the middle. Maybe, at some point, you've thought of them as the people who "just don't care." Well, maybe they don't care because no one's ever asked them to care, or educated them as to why they should care. **It's important to remember that the number one motivation for people to take action is their own self-interest**. If you can show people the benefits they will gain from supporting your **issue**, you can turn them into **allies**. On the other hand, if you alienate people by never asking their opinion, or making assumptions about them, you can turn them into **opponents**. In Direct Action Organizing, and in politics in general, it's the people in the middle that everyone fights over. They can be swayed, which is why they're often known as the "movable middle." Your group should brainstorm a list of people you're not sure about. Then, divide up the list and have everyone take responsibility for a part of it. You are about to embark on a fact-finding mission. It's best to assign people the names of individuals they know or with whom they share some connection, no matter how loose. People are much more likely to have an opinion on an issue when they know or recognize the people working on it.

8. WHAT DETAILS AND FACTORS IN OUR OWN GROUP DO WE NEED TO THINK ABOUT?

When planning an **issue campaign**, it's easy to focus on everyone else – what your **allies** and **opponents** think, how to reach your target, and how to build others' interest and support for your issue. It's important both for the health of your group and the success of your **issue campaign**, however, to think about the group itself.

Begin by making a list of your group's strengths and weaknesses. Perhaps you have a lot of people who are great at doing behind the scenes work, but not so many who feel comfortable in the spotlight. Perhaps you've got a couple of people with boundless energy, but most of your members are on the verge of burnout because of their other commitments. Perhaps you have some people in your group who don't get along very well. Perhaps your group isn't very inclusive or diverse, or perhaps it is. All of these factors need to be taken into consideration. They're known as **organizational considerations**.

Another list you should make is a list of the ways in which you want your **issue campaign** to strengthen your group. Do you want to increase your membership? Learn new skills?
Double your contact list? Raise money? These factors are also **organizational considerations**.

> "PEOPLE REFUSE TO OPEN their eyes to the problems that surround this issue. When a person says that they never notice a problem with LGBT people being forced into silence, they are choosing to be blind to it. This Day is a definite eye-opener."

9. WHAT DO WE HOPE TO ACCOMPLISH WITH THIS SOLUTION?

In Direct Action Organizing, what you hope to accomplish in your issue campaign is known as your goal(s). Another way to think of **goals** in this context is "What are our **demands**?" It's useful to separate out your long term, intermediate, and short term goals, in order to maximize your group's time and energy, gain a clear understanding

of how your activities connect to one another, and build participation and interest from your initial victories.

Long Term Goals

A **long term goal** is the vision or ideal you have for what your school should look like and how it should treat your **issue**. It can also be helpful to break down that long term goal to something you don't think you can accomplish in the next year but are aiming for in your **campaign**; for example, a **goal** to have every single administrator, faculty member, and support staff member in your school trained in how to support and advocate for LGBT students.

Intermediate Goals

Your **intermediate goal** is your **issue**, the thing you want from your target that you will build the **campaign** around. It should be concrete, so that everyone knows what constitutes a victory. While you ultimately want safety, respect, and support for all LGBT students, by setting intermediate **goals**, you have concrete steps – such as mandatory staff training – to work toward your vision.

Short Term Goals

A **short term goal** is the first step of your **campaign**, and leads directly to your intermediate **goals**. It should be something you are fairly certain you can win, but that will require your group to mobilize large amounts of people to build momentum in your **campaign**. Examples of short-term **goals** would be to obtain a meeting with

your principal or superintendent, to get support from the teachers' union, or to hold meeting for family members.

10. WHAT SPECIFIC STEPS DO WE NEED TO TAKE TO ACHIEVE OUR SOLUTION?

Using your short term goals, you can begin to group some of the short term **goals** together or break them out into different **strategies**. One **strategy** could be educating **allies:** another might be specifically mobilizing parents or other identity groups. A **strategy** is a larger scheme of activities that form the basis of your **issue campaign.** Some **strategies** include voter registration and mobilization, electoral politics, statewide referendums, issues education or lobbying elected officials. Depending on your **issue campaign**, you may wish to use more than one strategy.

Once you've identified your **strategy/strategies**, you should brainstorm a list of possible steps that your group could take to support it. Returning to the previous examples, let's say that one of your **strategies** is to meet with your **targets** in order to educate them about your **issue.** You plan to meet with your principal, to discuss anti-bias teacher training, or your Dean, to discuss LGBT student support training for college counselors. What specific steps can you take to make that meeting happen successfully? Do you need to do research so that you can show your **target** evidence that anti-LGBT harassment exists in your school, or that LGBT students feel unsupported by the counseling staff? Do you need to find information about trainers and training resources that have worked in other schools? What about contacting the **target**? Do you plan simply to call for a meeting appointment, or would a

formal letter, signed by group of concerned students, be more effective?

All of these very specific steps are known as **tactics. Tactics** are deliberate, planned actions, and should be designed to show power to your **target**, and to increase visibility and support for your **issue campaign**. Everything you do, from how you contact supporters to how your group chooses to behave at a protest rally, is a **tactic**.

What's more, a tactic can have tactics. A perfect example of this is the Day of Silence. Within the planning of the Day, there can be multiple **tactics** for generating publicity, building participation, increasing visibility of participants and using momentum to organize additional events. At the same time, the Day of Silence can be one **tactic** in a larger **issue campaign** to reduce harassment of LGBT students, or to increase support of LGBT students.

The Day of Silence on its own is a compelling statement supporting LGBT people and others who experience silencing and oppression in your school community. Imagine how powerful the Day of Silence could be in your school if you were to use it as a **tactic** to further a larger **issue campaign**.

The Day of Silence, as a nationally organized event, can:

- make your group and its **issues** recognizable to members of your school community
- raise general awareness around LGBT people and concerns in your school community
- generate momentum for your future actions
- mobilize a network of **allies** for you to call upon for assistance and support

- help you to raise money to sustain your work
- provide the foundation for building a **coalition** of concerned individuals and groups from the local to the national level
- bring to your work the attention of media, elected officials, local and national LGBT organizations and others concerned about school safety, equitable education, students' rights, diversity, and social justice

Think about it!

TA-DA!

When you put these ten organizing steps together and figure out what role each can play, you have your **issue campaign**. The Midwest Academy, one of the nation's oldest and best known schools for community organizations, citizen organizations and individuals committed to progressive social change, has developed a graphic model called the "Strategy Chart" that can help you to arrange your information into an overall **campaign**. If your group would like to go through the process of visually mapping out your **goals, organizational considerations, constituents, allies,** and **opponents, targets,** and **tactics,** you can complete your own Strategy Chart.

COALITION-BUILDING

A **coalition** is a diverse cluster of individuals and groups that work together to reach a common goal. That goal might be a number of things, but often includes one of the following:

- Influencing people's behavior (for example, reducing anti-LGBT verbal harassment)
- Building a healthy community
- Adapting, creating, or expanding public policy

WHY BUILD A COALITON?

- To provide programs and use resources more efficiently and effectively and to eliminate any duplication of services (in other words, to avoid reinventing the wheel)
- To increase communication between groups and break down stereotypes
- To revitalize the sagging energies of members of diverse groups who are trying to do too much on their own
- To plan and launch community-wide efforts
- To win victories that couldn't be won by one group alone
- To build a stronger power base
- To develop new leaders

HOW DO WE BEGIN TO BUILD A COALITION? BE STRATEGIC

Be strategic in how you construct your **coalition**. Don't assume it will come together "naturally." Whom you ask, how you ask them, and who you ask first, second and third, are all important. Some groups won't join if others have been asked first. Some groups won't work together and you won't be able to get both on board. Take into

account your own **goals** and **organizational considerations.**

It's important to build a diverse, representative **coalition.** Start with a list of every student and/or community group that is concerned with, affected by or working on diversity, equity and social justice issues. Be creative with your list; don't limit it to the most obvious choices. Once you have your comprehensive "wish list," you can begin to narrow it down according to specific concerns and circumstances. Identify the **self-interest** or the reason each group might have or wanting to join the **coalition**, and understand and respect that groups will have different reasons for joining.

Once you are ready to ask groups to join, don't approach them as a "token" gesture. All needed groups should be signed on and at the table from the beginning. Diversity will only happen if the **coalition** works on issues that cut across many groups and acknowledges how barriers created by institutional sexism, racism, heterosexism, ableism and classism affect the internal workings of the **coalition.**

CHOOSE UNIFYING ISSUES

Coalitions come together around a common **goal** or set of **goals**. These **goals** must be developed by more than one group. Don't decide on the **issue** and the **strategy** and then invite others to join you. This doesn't work because other groups won't feel invested in the project. Develop **strategy** collectively. **The strength of a coalition lies in its unity**. Work with other groups to develop a **strategy** that makes sense for everyone. The **tactics** you

choose for your **campaigns** should be supported by all members of the **coalition.**

Avoid **coalitions** based on groups agreeing to exchange help. Groups can rarely deliver their members to work on some other group's program, and no group will feel that it got enough out of the **coalition.**

JOINING EXISTING LOCAL/STATE COALITIONS

If there is a coalition formed already outside of your school or off-campus, it's imperative that students have a seat at the table! **Coalitions** can be very easy to join; just call around to local community groups and organizations, find out if any active **coalitions** exist, get the names and contact information of the people heading up the coalition, and call them. Let them know that students at your school are interested in joining the **coalition.**

II. THE DAY OF SILENCE AT YOUR SCHOOL

PUTTING TOGETHER A LEADERSHIP TEAM

The Day of Silence entails organizing individuals and/or groups throughout your school to learn from the experience and to participate in additional activities and events devoted to ending the silencing of LGBT youth. The following guidelines offer suggestions for how to manage these somewhat challenging tasks and organize the Day of Silence at your school. Keep in mind that these are only suggestions; we encourage you to adapt the information so that it works for your own school.

You should start to plan the event at the beginning of the spring semester, in January or February. This way you have lots of time to brainstorm innovative and crea-

tive ideas, and lots of time to take care of all of the potentially overwhelming details that are part of planning any event.

First things first, you should build a team of people who are willing to help you organize the day of silence at your school. You may want to organize the Day of Silence through an established school group (such as the gay-straight alliance, (GSA). Amnesty International club, or Student Union), or you may want to build a **coalition** of interested individuals from different school groups. It's important, however, for you to think very deliberately about the people you need and want to include and for you to recognize that as you begin and continue to plan, your needs may change. Try to get a group of people together who have a variety of strengths and interests, such as public speaking, making fliers, organizing publicity, fundraising, and contacting potential supporters. Can you organize the day of Silence alone? Yes, but the impact will be significantly greater if you outreach to others to join you.

Once you've brought these people together, it's time to brainstorm. You should think about the reasons you have for wanting to organize the Day, **the people** you want to reach with the Day, and **the message** you want to communicate to them. After you've decided these things, it will be much easier to develop an effective **strategy.**

SOME QUESTIONS FOR BRAINSTORMING MIGHT INCLUDE:

1. Why is the Day of Silence needed at our school?
2. What do we want to change at our school, & how can we use the Day of Silence as a tool in accomplishing that goal?
3. Who knows about the Day of Silence at our School?
4. What do people know about the Day of Silence at our school?
5. How did they learn about it? What publicity strategies have we used? What has been most successful? Why?
6. Who else should know about the Day of Silence?
7. What is the best way to reach them?
8. What obstacles have we faced?
9. What resources might we need?
10. How can organizing the Day of Silence help to build interest and participation in our group?

Once you've determined the answers to these questions, it's time to get to the nitty-gritty of planning the Day. Your group should draft a **strategic plan.** The **strategic plan** should address **what** will get done, **when** it will get done, and **who** will be responsible for doing it. There are lots of elements to keep in mind; committing people to help with planning, reserving space for "Breaking the Silence" events, fundraising for resources and guest speakers, finding out procedures for publicity and organizing additional tactics are just a few tasks that require planning in advance.

CREATING A TIMELINE FOR YOUR STRATEGIC PLAN

A strategic plan is simply a way to organize your tactics into a timeline that you can then follow to achieve your goals effectively. The following sample timeline includes the "deadlines" and guidelines organizers have needed to achieve their goals; the main ideas are then broken out into more detailed thematic sections. We encourage you to expand and customize the plan to meet your own goals. If you have decided to organize for the Day of Silence and it is only a few weeks away, don't panic or give up you can still pull it off!

FIRST THINGS FIRST
THINK ABOUT YOUR GOAL

If you're using the Day of Silence as a tactic in a larger campaign, make sure you map out the "big picture" so that everyone understands the role each person and each part of your planning is going to play in accomplishing your ultimate goal. Make goals measurable so that you may easily evaluate the success of your work.

ASK FOR INSTITUTIONAL SUPPORT

If you are a high school student, it is important to think about the school procedures and policies regarding events like the Day of Silence. If you are a member of a student club, or a GSA, your faculty advisor can be a key ally in figuring out who in the administration you should speak with and what permissions you will need for breaking the silence events. Individuals organizing the Day of Silence should seek the advice of a supportive teacher or member of the administration about letting the school know what

you want to do. Another section, "Potential Challenges for Day of Silence Organizers and Participants" offers some suggestions for approaching the administration about your plans.

NETWORK

Determine which people you need and want to participate in all aspects of the Day of Silence. Who should help to organize participants? Who should help with publicity? Who might be able to provide funding? Whose endorsement would be valuable to you? Who is going to oversee all of the planning? Don't forget to compile a list of volunteers who'd be willing to help with the time-consuming tasks.

JUMP ON THE BANDWAGON

When the decision has been made to join the Day of Silence Project, email the Day of Silence Project and become an officially participating school. Visit the website (www.dayofsilence.org) to fill out the online registration form, or contact us by phone, mail or email, include your school's name and the sponsoring group's name (and web address, if applicable). We will post the names of all participating schools on our website, although we do not post the names of individual student organizers.

EVALUATE COSTS

If you plan to design your own publicity materials (speaking cards, guidelines, flyers, or other materials), plan on spending a minimum of $50 on printing for the event. Sample versions of these materials are available on the Day of Silence website (www.dayofsilence.org); if you

choose to use those, you only need to budget for paper, cardstock and printer labels/stickers. If you're hosting a guest speaker, renting a space for an event, or printing t-shirts for participants, budget this stuff now as well.

CULTIVATE THE TEAM

Plan ongoing meetings with the core group of participants who will be responsible for planning and coordinating the work. Divide up the tasks for groups or committees to follow up on. Remember one person needs to be responsible for the Day of Silence list of participants. Be careful to collect only "safe" contact information; for a variety of factors some people may not be able to be contacted. Have food and energizers – to make it fun – at every meeting. Review your timeline and goals at every meeting too!

SIX WEEKS IN ADVANCE
CONTINUE TO NETWORK

Compile a list of contacts from student groups that you can use to outreach to Day of Silence participants. Make initial contact with these groups to explain the Day of Silence, and to find out their meeting times and places. Consider asking for co-sponsorships or endorsements from these other groups, to increase the depth and breadth of the Day.

PLAN ADDITIONAL TACTICS

Brainstorm events, activities and program (**tactics**!) to reinforce the Day of Silence and further your campaign, such as a "Breaking the Silence" rally or other gathering at the end of the Day where participants can share their

experiences or hear a guest speaker. Decide which **tactics** would be most effective and practical, and, ask for volunteers to help to plan them.

ONE MONTH IN ADVANCE
SPREAD THE WORD

Attend meetings of the groups from which you are going to outreach to participants. We'll call these "ally groups." Ask in advance for permission to make a brief announcement at their meetings. Ask each group's secretary to include the Day of Silence in the meeting minutes, and to post information in the group's meeting space, office, bulletin board, and/or email list. Tell the group when you plan to return with the materials for the Day of Silence participation.

> "IT TAKES A SMALL effort and makes a big impact, whether you have five or fifty people that actually participate. The Day of Silence was very symbolic for me. Since I am normally very outgoing and talkative, my peers noticed that something was up right away. The Day of Silence gave me the chance to inform the many people about the needs of my community. The most successful part of the Day of Silence is how many people you can inform personally within the space of a single working day."

GET THE GOODS

Design and print your own materials, or download from the website the flyer to advertise the Day of Silence, the guidelines for participants to follow, the speaking cards for participants to hand out, and stickers for participants to wear. Make sure that the materials have the date of the

Day of Silence printed on them, as well as pertinent information about any additional tactics you've planned.

TOOT YOUR HORN

Send press releases to school and local media. Be sure to indicate the contact information of your Day of Silence organizers, or the name and contact information of your group if you don't want to use individuals' names.

CREATE A SAFE SPACE

Reserve a "safe room" at school that people can visit if they need to be with other participants during the Day itself. Talk with school counselors about having a counselor on duty, if that's right for your school, or have students volunteer to be "peer supporters" in the safe room during the Day.

THREE WEEKS IN ADVANCE
REMIND PARTICIPANTS

Attend ally group meetings again. Distribute materials to Day of Silence participants. Keep a list of participants; it's important to have a general idea of how many students are participating. Thank the organizations for working with you.

RECRUIT, RECRUIT, RECRUIT!

Keep recruiting participants – your friends, your friends' friends, your family, your neighbors, classmates, faculty, school staff, anyone. Remember, for those who can't be silent, you can suggest alternative ways to participate.

WORK THE MEDIA

Design and submit an ad to the school and local newspaper(s) announcing the Day of Silence. Submit public service announcements (PSAs) to school and local radio stations. Write and submit a letter to the editor of your school newspaper to be printed on or just before the Day of Silence.

ONE WEEK IN ADVANCE—
HOLD PREP MEETINGS

Have a pre-Day of Silence meeting for participants and those hosting the safe room. Talk about what will happen during the silent hours and how participants might be most effective throughout the Day. It's a good idea to rehearse strategies for handling reactions to your silence. Also, inform participants of the message(s) and talking points.

RACE TO THE FINISH LINE

Send out press releases again. Keep recruiting participants. Attend ally group meetings one more time if you think that it will help recruit more participants. If you have a specific area at school where student groups advertise, post flyers there to publicize the Day of Silence and recruit volunteers. Put up flyers advertising the Day.

THE DAY BEFORE
GET EXCITED!

Remind people that the Day of Silence is tomorrow. If you have an email list of participants, send a reminder to them. If you have a phone list, ask some volunteers to call

as many people as possible. Remember, you should never call or email people who haven't "officially" given you their contact information.

ADVERTISE

Post flyers everywhere. Write with chalk on the sidewalks.

SECURE YOUR STAFF

Make sure people are available to host the safe room.

FINALIZE ADDITIONAL TACTICS, AT LEAST THOSE HAPPENING DURING THE DAY OF SILENCE

In particular, make sure everything is ready for the "Breaking the Silence" events: logistics, publicly participants and so on.

THE DAY OF SILENCE!
SSSHHH!

Be visible. Hand out as many speaking cards as you can. Whatever your goal, the Day of Silence is the perfect opportunity for you to build support and momentum. You may want to schedule people to stand at a prominent spot at your school and hand out speaking cards all day to passers-by. Smile and give a thumbs-up to other participants. Drop by the safe room and get support from fellow participants. Take time to think about why you are being silent and how it makes you feel.

BREAK THE SILENCE WITH ALLIES AND SUPPORTERS

Attend the "Breaking the Silence" events and give yourself a pat on the back! Enjoy the achievements of the day, thank the participants and your allies and take a moment to appreciate your collective strength.

THE FOLLOWING WEEK
CELEBRATE!

Hold a party to thank everyone who participated and helped out.

ASSESS

Did the Day of Silence meet your expectations? Did you achieve your goal, or are you now in a better position to achieve it? What was particularly successful about the Day? What might you have done differently?

FOLLOW UP

Attend ally group meetings or send thank-you emails/ notes expressing your appreciation for participation and other help. Contact the Day of Silence Project to share how the Day of Silence went at your School including great ideas you had, problems you encountered, participation data, and suggestions for next year. Write a thank-you letter to any businesses, community organizations or individuals that sponsored you telling them how well the event went and how vital their contribution was to your success.

COORDINATING OUTREACH

Nothing is more important than participants during the Day of Silence. The most important key to success is to let as many people as possible know about the Day and how they can participate, as well as where they can access materials for participation. In high schools in particular, it will be critical in publicity and outreach efforts to have administrative support.

Secondly, the most important task is to let people know about the Day and how they can participate, as well as where they can access materials for participation.

GATHERING PARTICIPANTS

There is no "right number" of participants for the Day of Silence, although the general rule is the more, the better. The more people participate the more visible the event will be, and participants will feel less alone during their silent hours. In the past, Day of Silence organizers have recruited participants from individuals and school groups of all backgrounds, interests, sexual orientations and gender identities/expressions.

Before you start recruiting participants, make sure that you have materials available and accessible for those who wish to participate. You need to create a way for participants to be visible. You could give participants a sticker to wear that says "Day of Silence." Some schools have had participants wear all black or a noticeable armband. Still other schools have had T-shirts made up for their participants to wear during their silence. Work with your budget to get the most creative and cost-effective materials. T-shirts and stickers adorned with a rainbow or some other LGBT symbol will clearly define

what the event is about. Remember that you can always use the sample flyer and sticker that are downloadable from the Day of Silence Project website (www.dayof silence.org).

You will also want to provide all participants with enough speaking cards to pass out to people they usually encounter. Make sure the card has the date of the day of silence on it so that would-be participants do not forget, the Day of Silence Project web address (www. dayofsilence.org) for people who might wish to find additional information on LGBT issues, and the contact information for your school's organizers. Remember that the speaking cards are a great way for your group to get some general publicity! Finally, you should supply participants with some guidelines for remaining silent. Have these materials accessible and available whenever you talk to school groups or advertise for the Day of Silence. We recommend having materials available at a central school location as well: perhaps a library, a supportive teacher's office, or the LGBT group's office.

So now that you've got all that ready, make a list of people and groups that you think might be supportive of the Day of Silence. Write down every person and group you can think of, and don't be afraid to be adventurous in your choices; you'll never know unless you ask if someone will want to participate. Try asking the following groups to participate (some are more applicable to college-level organizing):

- LGBT and Ally Groups
- Women's and Feminist Organizations
- Racial/Ethnic/Cultural Affinity Groups
- Religious Organizations
- Sororities and Fraternities
- Residence Halls
- Political Organizations
- Student Government and Leadership Groups
- Student Centers
- Counseling Centers
- Faculty
- Staff
- Administration
- Athletic and Recreational Groups
- Sexual Assault/Domestic Violence Organizations
- Academic Groups
- Individual Academic Departments
- Specific Classes (for example, history classes that study social movements or nonviolent protest)

The more groups you have participating in the Day of Silence, the broader the support the Project will receive. You may even want to ask the groups, if they would like to co-sponsor or endorse the Project – this is a great way to get visibility and funding.

The following are some great ways to approach potential allies:

1. PERSONAL CONNECTIONS

Let's face it, nothing's better than a personal connection when it comes to asking individuals or groups for help. Make a list of the other groups your organizers belong to, and which students belong to which groups. These individuals already have a relationship to those groups, and can ask in person for their participation, endorsement to

help. Then make a list of the groups your organizers do not have personal connections with, and designate someone to contact those groups to ask if one of your organizers can visit their meeting and talk for a few minutes about the Project. Bring materials to their meetings and try to stay for the entire time; groups will be more receptive to you if you show an interest in their activities. With this in mind, you may wish to designate someone to attend ally groups' meetings on a regular basis.

2. EMAIL AND LETTERS

It's time to start writing. Email can help immensely with this task, especially at schools where most students have accounts. Write students and groups a letter explaining the Day of Silence message, suggesting why they would want to participate, and specifying when and where they can pick up materials. Encourage them to write to you to confirm their participation and to forward the letter to other individuals and/or groups. Email spreads like wildfire, so make the most of this opportunity.

3. NEWSPAPER AND RADIO ANNOUNCEMENTS

Take advantage of your school media. It is often the case that newspapers and radios offer free public service announcement (PSA) spots for good causes. Draft an announcement or advertisement seeking participant in the Day of Silence. Be sure to include contact information for organizers and the location and time for picking up materials.

4. TABLING

You'll always pick up some participants during the week before the event. Have tables out in high-traffic areas, such as the student center and cafeteria, with materials for participation. Don't rule out picking up participants on the Day itself. People will get excited to participate as they see other participants, so be sure to have lots of materials on hand on the actual Day.

5. FLYERS

You'll certainly be able to pick up a few participants if you have some eye-catching flyers. In addition to being elective general publicity, flyers draw people in who may not be networked into organizations and groups. Again, be sure to include specific information about where and when to pick up materials for participation. A great sample flyer can be downloaded from the Day of Silence Project website for your use.

GENERAL PUBLICITY

Generally, the same venues you used for collecting participants will be venues you can use for getting the word out about the Day of Silence. Put ads in school and local papers and PSA's on the radio. Flyer profusely before the event with catchy slogans such as "Shhh! Day of Silence" or "End Anti-LGBT Bias: Day of Silence." Make advertisements eye catching, informative and accessible to people who may not be familiar with the event or the LGBT community. Make sure that your press releases and ad campaigns include some tangible examples of silencing and anti-LGBT bias. If your school includes students

whose native language is not English, you should reach out to those students by creating materials in their languages. Ask groups that have agreed to participate in the event to communicate the importance of the event to their members. Everything you've done to recruit participants, you should also do to promote the event widely.

BUILDING A MESSAGE

What's the message of your Day of Silence? How you present your issue and group is crucial in outreach to participants and generating publicity. First, any part of your campaign should have a plan. Begin your "message" plan with some of the tools you've already used for your strategic plan, such as identifying your goal(s) and constituents/allies.

What influences people to care about your problem? The more personal you make your message with facts and stories, the more likely they are to agree with your solution to the problem. Families may be most concerned about student safety, and faculty may be more concerned about the improved climate of their classroom or improved student performance. Be prepared to have various messages that are consistent, don't contradict one another and can be used again and again. You may also want to anticipate what messages the opponents of your issue might use, and address those in a positive way.

> "IT IS SELDOM EASIER to make such a profound statement for justice than it is with the Day of Silence Project. Those who participated, myself included, made it a point to make our silence known. We were received at worst with just a look of confusion. For many [our greatest challenge] was getting through the middle of the day,

lunch for instance, that made our silence most known. It is important to have tons of cards."

You can highlight several messages to be key phrases or "talking points" for giving media interviews, testifying at board of counsel meetings and talking about your campaign to potential participants or funders. Anyone working on your campaign should know your message and talking points. Role play public speaking scenarios with your team, so that everyone has a chance to build their comfort and confidence with communicating the message.

Consider the following tips:

- **Have a bigger plan.** Creating a message is part of a bigger plan for media and outreach to participants and supporters.
- **Keep it simple.** The language and ideas of the message or "talking points" need to be understood by many people who will hear and/or read them.
- **Prepare "Message Deliverers."** The basic message may be the same, but people can personalize it with their own stories and examples.

MAXIMIZING THE MEDIA

KNOW THE MEDIA

Find out who the education reporters from your local newspaper, radio and TV stations are, and obtain their professional contact information. Give them a call and introduce yourself. They probably will be flattered and therefore more likely to work with you. This type of personal approach to the press is typically over-looked. Have one of your organization's members keep a database

or list of the reporters from local and statewide press that allows you easy access to their information.

KNOW YOUR OWN AGENDA

Ever heard the term "stay on message?" Always have an eye on the three main points you want to get across to reporters in every interaction, even the most casual. These "talking points" should be reiterated in everything you send to the media. Press releases, fact sheets, quotes, interviews and other materials should all cover these main points in different ways.

KNOW THE BASICS: PRESS RELEASES AND ADVISORIES

Tell the print and electronic media about the Day of Silence by sending a press release and calling their offices. No matter how well you have advertised the event, do not assume that they know about it.

The press release is one of the most commonly used tools for getting press attention. Consider the press release as your version of the story that you want picked up by the press. Releases can announce an activity, clarify a point or rebut/respond to a controversial issue of concern to your organization or community. Press releases should do more than promote your organization. They should appear to be newsworthy. The press release should give context and a spin to your story. Be sure to make your story substantive but simple.

The attention-grabbing headline and the lead paragraph are the most important elements of the release. Often, they are all the reporter or editor has time to read. The

lead should contain the five W's: who, what, when, where and why. The following guidelines can help you to write an effective press release:

- Neatly type the release
- Include the name and number of the main contact person at the top of the release
- Write the release as if you want the story to appear in the next day's paper
- Indicate the date the information can be released in the top left-hand corner
- If the release is two pages, write "more" at the bottom of the first page
- Use an attention-grabbing headline that summarizes the story in as few words as possible
- The first paragraph should include all of the most essential information
- Try to keep your release objective – if you want to include value statements, do so through direct quotes
- Use full names and titles when they are mentioned for the first time; if the person is cited again, use their last name only
- Use quotes for emphasis and always credit the source
- Indicate end of release with 30, ## or "end" (this is press etiquette and signifies the end of the release)

KNOW THE BASICS: INTERVIEWS WITH SCHOOL-BASED MEDIA

Hold an event, even if it simply a planning meeting, that a reporter and photographer can attend. During the Day of Silence, the silent hours are not very conducive to front-page pictures – "Here is a student not talking!" – but the "Breaking the Silence" gatherings at the end of the day can provide lots of photo opportunities.

Have a quote or two prepared, for answering common questions. You will almost definitely be asked these questions, and it can be hard to answer well on the spot. Writing answers on note cards and keeping them with you can be helpful.

- Why do you think we need the Day of Silence at this school?"
- What are some examples of anti-LGBT bias at this school that make the Project relevant?"
- How do you think that silence can end silence?"
- How would you describe the general atmosphere at this school regarding LGBT people?"
- How many people are participating in the Day of Silence at this school, and who are they?" (i.e. what groups are they from)
- How many other schools are planning the Day of Silence?"

If you are being interviewed and you do not like a certain question, feel free to redirect it. Make sure you talk about what you want to talk about, because you are better informed than the reporters.

Ask the reporters to read back your quotes at the end of the interview. Doing this can avoid misquotations, although sometimes mistakes happen anyway.

KNOW THE BASICS: PROFESSIONAL PRESS CONFERENCES

ONE WEEK BEFORE YOUR PRESS CONFERENCE

- Reserve a room that is not too large so it will not look empty if attendance is low
- Pick a convenient date and time – Tuesdays, Wednesdays or Thursdays – are best and try not to schedule it before 10:00 a.m. or after 2:00 p.m.
- Prepare written material, including written statements and press kits
- Send out written announcements by fax or mail, or hand deliver them to editors, assignment desks, reporters, weekly calendars, alternative press, community-based newspapers or newsmagazines and other supportive groups.

THE DAY BEFORE

- Decide on the order of speakers and who will speak on which topic
- Call all prospective media and urge their attendance
- Collate materials; make extras for follow-up
- Walk through the site and review materials
- Type up names and titles of spokespeople for the media handout

- If people can speak other languages, be sure that bilingual media can find them easily

THAT MORNING

- Make last minute calls to assignment desks and desk editors
- Double-check the room several hours before
- Walk through the press conference with speakers

DURING THE PRESS CONFERENCE

- Have a sign-in sheet for reporters' names and contact information
- Give out press kits
- Hand out a written list of participants
- Make opening introductions
- Arrange one-on-one interviews if requested

EFFECTIVE FUNDRAISING

Sometimes it seems that the only thing that stands behind you and having the capacity to run an amazing Day of Silence is money. First of all, commitment, participation and energy are always more important than money. Your strategic plan, however, should include a budget which will cover basic expenses, such as speaking cards and guidelines for a few dozen participants, publicity and materials for the Day of Silence itself, as well as expenses for additional tactics. You can organize the Day of Silence on a very small budget: rely more heavily on word-of-mouth, school papers and homemade posters for publicity;

plan simpler "Breaking the Silence" and additional events. If possible, the budget could include funds for more expensive resources, such as a guest speaker, or T-shirts for participants. If you're thinking bigger, the money exists - you just have to know where it is and how to get it.

The following fundraising tips, some of which are more applicable at the college level, can help your group to get the resources needed to make your ideas and goals for the Day of Silence a reality. Don't forget that some donors may prefer to offer in-kind donations, by which you're provided a free product or service rather than money. Remember to ask for funding well in advance!

ACADEMIC DEPARTMENTS AND FACULTY

Virtually all academic departments have funds available for students who want to attend conferences or for project and program planning. Often, individual professors have their own discretionary funds, which can be made available to students. The important detail when approaching faculty for money is a clear connection between the program or event and the academic mission and goals of the particular department. Finally, get to know who the active faculty are at your school. Often, they can give you assistance or the "inside track" on funds that are available from faculty. Faculty may also require you to do a related assignment in order to receive the funds.

ADMINISTRATIVE DEPARTMENTS AND INDIVIDUAL ADMINISTRATORS

Similarly to academic departments, administrators have funds available for the same type of student programming. Unlike academic departments, however, administrators

usually don't have as many restrictions. They are free to give funds to a broader range of activities. This doesn't mean you shouldn't take a strategic approach to raising money from administrators. Each department has its own agenda, and they will be more willing to give funds to student projects which will further their department's mission.

STUDENT GOVERNMENT AND STUDENT PROGRAMMING BOARDS

Student governments and programming boards have the largest pool of funds directly available for individual activities and events. Each has its own funding process. Usually they require the student or group to show how their program or campaign will contribute to the overall educational environment of the school. These funds are usually first come first served, so you need to submit your funding request early in the semester!

COMMUNITY ORGANIZATIONS

Community groups such as civil rights organizations, women's groups, LGBT organizations, local unions and other community organizations are fabulous places to approach for funds. It usually takes a meeting with the local President or Executive Director, and some good follow-up, to receive a small amount of funding. They will usually ask that they be acknowledged as a co-sponsor on materials for events and campaigns. Your community fundraising efforts will be more successful if you have developed a working relationship with the organization you approach. It is important to community groups to see

some investment from you in their work, not just their funding resources.

> "DO IT! HOWEVER, start planning early and follow the planning guidelines on the Day of Silence Project web site. It meant a lot to me and a few others but not a lot to the entire group. I think that's due to the fact that we didn't plan and publicize well in advance of the event."

LOCAL BUSINESSES

There may be businesses in your local community that are owned and/or operated by LGBT people or allies who would welcome the opportunity to support the work of LGBT student organizers by providing funding or free/discounted services to your Day of Silence. Some communities with significant LGBT populations publish an LGBT Yellow Pages. Another way to determine if a business is LGBT-friendly is, of course, a rainbow sticker displayed on the premises. Students in your group may work in LGBT-friendly establishments, or have friends or family who do. Even very small businesses may be able to offer a valuable contribution to your work. You may not get cash, but never underestimate the expenses you could save by receiving in-kind donations such as printing services, art supplies and food.

INDIVIDUAL DONORS

It's been said that "charity begins at home." If you interpret "home" broadly, you may have a pool of family, friends, neighbors, co-workers and acquaintances who would be happy to contribute a donation to your group, especially if you can show them that other members'

families and friends also have contributed. Even in large nonprofit organizations, many individual donations happen through word-of-mouth education and publicity.

FUNDRAISING EVENTS

If in-kind donations and small contributions are not enough to cover your budgeted expenses, you may want to organize larger fundraisers, such as:

- Raffle
- Car wash
- Bake sale/candy sale
- Dance
- Benefit concert
- Athletic event or "-athon"

Ask around to see what has and hasn't worked at your school before investing time and energy into these events. Also, remember to use the events as an educational opportunity; for example, people attending a dance can leave with a "grab bag" of informational flyers, speaking cards and stickers for the Day of Silence!

FIVE KEY STEPS TO RAISING MONEY

1. Send out a formal letter requesting funds to every faculty member, department, administrator, funding board and organization you have identified as a potential source of money. The letter should be no longer than one page, and should briefly introduce you and/or your group, and explain the Day of Silence.

2. Seven to ten days after you send the letter, follow up with a phone call. Often, people will not even look at a letter unless they receive a follow-up call. Ask if you can set up an appointment to meet with the appropriate person, and find out exactly what information and materials they would like you to provide them.

3. Develop a longer, written proposal for your initial meeting with the contact. This proposal should include a detailed description of your group and the Day of Silence, and an explanation of how the Day is consistent with the mission and goals of the department, committee, organization or business. You should also include any materials you have, especially your Day of Silence **strategic plan.**

4. Finally, develop a visual presentation for funding boards and committees. This should allow you to walk a larger group of people through your written proposal. Attempt to anticipate questions you will receive and have answers prepared ahead of time, just as you would for the press.

5. The day after your meeting or presentation, mail a thank-you letter. This should arrive prior to the date they set for informing you of their decision. The thank-you letter should repeat the benefits funding the Day of Silence would bring to the school and the community.

VISIBILITY BEFORE AND DURING THE DAY OF SILENCE

FLYER PROFUSELY THE DAY/NIGHT BEFORE.

Flyer like you've never done before. These signs will be your words for the day, so make sure they're everywhere.

ENCOURAGE PARTICIPANTS TO PASS OUT THEIR SPEAKING CARDS DURING THE DAY OF SILENCE

The speaking cards are a crucial part of the Day of Silence. They are your most captivating publicity tool, since they are handed directly to individuals, and they provide the greatest opportunity for educating your school community. In addition, they are participants' primary means of communication throughout the day, so passing them out can be very powerful both for the given and for the recipient. Hold a rehearsal meeting prior to the Day during which participants practice silently passing out their cards and silently handling reactions from supporters and opponents. Whenever you see participants during the day, encourage them – silently– to keep passing out their cards!

HAVE A RESOURCE TABLE STAFFED ALL DAY.

Have a resource table in an accessible spot in your school, with materials about the Day of Silence Project and any other LGBT resources you can provide.

HOLD A VISIBLE EVENT DURING THE DAY.

This event could be a "silent lunch" where participants sit in the school cafeteria or student center and eat together, or a silent rally in a high-traffic area. It is powerful and unifying for participants to see others participating, and a visible event provides photo opportunities for the media.

ADVERTISE "BREAKING THE SILENCE" GATHERINGS AND ADDITIONAL EVENTS AND ACTIVITIES ON ALL DAY OF SILENCE MATERIALS.

On the back of your Day of Silence cards, include information about any additional tactics you've planned and would like people to know about.

BREAKING THE SILENCE

Participants from previous years have used lots of great ways to break the silence at the end of the day. There's the "New Year's Eve" model: participants assemble at the end of the day, there's a silent countdown to the designated finish time, and when the clock strikes, everyone screams, hollers, sings, rings bells, blows whistles, beats drums, shakes noisemakers and so on. There's the "Daybreak" model: participants assemble at the end of the day, there's a silent countdown to the designated finish time, and when the clock strikes, people begin slowly to make noise or speak as the feeling comes to them. There's the "One Voice" model: participants assemble at the end of the day, and when the clock strikes, participants take turns going up to microphones and speaking to the entire group.

One powerful approach is to have participants describe how it felt to remain silent for nine hours, and the responses they received throughout the day. Remember that participating in the Day of Silence can be a very emotional and exhausting event for people, so don't try to control the conversation too much.

ASSESSING THE EFFORT

The longer you wait to assess your Day of Silence organizing, the more difficult it will be to evaluate your work.

Your strategic plan should include plans for team assessment of your efforts. Try to have as many people as possible participate, giving each person a task in the assessment.

One good idea is to create a system for measuring your goals. You could regularly revisit each goal and assign it a number or other value that everyone understands, in order to track your progress. You could make monthly goals and then a year-end or project-end goal for each area of your work, such as outreach, meetings, budget, participation, publicity and so on. It's useful to have a method for evaluating your meetings and events, as well. One easy tool is the Plus/Delta. Take two large pieces of paper, and write a plus sign (+) at the top of one, and a delta sign (_), which is a symbol that represents change, at the top of the other. On the Plus page, ask participants to write something they liked, or that they thought was successful. On the Delta page, ask participants to write something they would change. Someone in your group should volunteer to collect evaluations at all meetings and events, and to develop a summary.

Want to make assessment more fun? For a final wrap-up at the end of a project or the year, plan a party that doubles as a time to look back at your goals, assess your work, and begin new planning.

ADDITIONAL TACTICS

A common pitfall for organizers is that after holding incredible events and getting everyone energized, they then offer no outlets for people who want to become involved in your work or obtain more information. Make sure that you take full advantage of the awareness the

Day of Silence will spread by offering additional activities, events and resources.

MATERIALS

Brochures and resources about LGBT issues in general, as well as LGBT resources available at your school, can help you to educate your school community and publicize your group's activities. If your group has a goal(s) it is trying to pursue, the Day of Silence is a good time to advertise and gain support! Have a petition and your mailing list available at your resource table and at events for people to express their support and/or receive information. The Day of Silence can be a great tactic in a larger issue campaign to end discriminatory practices or create resources for LGBT students.

EVENTS AND ACTIVITIES

Events bring people together, sustain the interest and momentum created by the Day of Silence itself, and further the larger goals of your campaign and your group. Especially effective are community gatherings that provide a space for reflection, celebration, dialogue, education and/or performance; and visual presentations such as display cases, murals, art installations and films. Make sure that you plan these events well in advance: budget time for finding speakers, find out how and when to reserve rooms, coordinate transportation for guests, assemble any multimedia equipment you may need. Advertise your events and activities throughout the Day of Silence campaign, and even on the cards. Put plans for these events in your strategic plan. Have fun and be proud of your accomplishments!

The following are some great ideas for events and activities:

SPEAK-OUT!

Speak-outs can be extraordinarily effective events if organized well. Timing is crucial. Speak-outs work best when you hear many different voices, so you don't want any one person to command the floor for too long. At the same time, you don't want to silence anyone by cutting them off in mid-sentence! Agree upon a time limit at the beginning, and encourage people to follow it so that everyone who wishes to speak has a chance to speak. You may also want to propose that speakers prepare their words before the event, but since remaining silent for nine hours can be difficult, preparation isn't always possible. Plus, some people decide to speak out after being inspired by other speakers.

GUEST SPEAKERS

Guest speakers can be a very useful addition to your events. They can bring the perspective of an outside ally, or an experienced LGBT leader; they can draw extra media attention and extra funds; and, they can attract people who might otherwise ignore your event out of resistance, complacency or just plain cluelessness. When negotiating with potential guest speakers, be sure to find out if they expect to receive financial compensation for their time or travel expenses – the last thing you want is surprise costs!

"NIGHT OF NOISE"

Another great idea is an event – perhaps combined with the speak-out – that showcases sound and speech as artforms. You could include singers, musicians, poets, spoken-word artists, performance artists and storytellers. You could hold a battle of the bands, a DJ spin-off, a poetry slam or an open mic. You could even record the evening's performances and produce a CD as a fundraiser!

NONVERBAL PERFORMANCE

Instead of, or in addition to, a "Night of Noise," you could hold an event that showcases nonverbal forms of artistic performance such as dance, mime and martial arts, to show how powerful movement and gesture can be, how expressive people can be even without their voices.

"DAY OF DIALOGUE"

Why not follow the Day of Silence with a "Day of Dialogue" during which you hold educational activities such as assemblies, rallies, workshops and teach-ins? Or, perhaps you could convince the faculty at your school to devote some regular class time that day to discussing the Day of Silence and anti-LGBT bias. Your group could place representatives in every class to facilitate such discussions.

FILM SCREENINGS

Films are a great way to draw a crowd, and there are several good education films that address anti-LGBT bias in schools and the experiences of LGBT youth (though certainly not as many as there should be – listen up all

you filmmakers out there). You could organize a regular film series with accompanying discussions. Or, you could document your own Day of Silence on film and screen the footage afterwards.

SILENT AUCTION

If someone in your group would welcome the responsibility of soliciting donated items, such as art (by LGBT artists?) or tickets (to events by LGBT performers?) or products or services (from LGBT businesses?) then hold a silent auction! It's fun, it's a great way to raise money, and people love the mysterious competition.

CANDLELIGHT VIGIL

This perennial favorite of social justice movements is, like the Day of Silence, a powerful visible means of showing collective support and strength. Since candlelight vigils often are used to memorialize a person or event, you could provide information about victims of anti-LGBT censorship and violence, or invite participants to speak about their own experiences with silencing, discrimination and harassment.

KEYPAL/PENPAL PROJECT

One of the most damaging effects of silence is the sense of isolation and alienation that it produces in people. Many LGBT youth remain silent in school because they feel isolated and powerless. Student groups have been successful in initiating concrete changes in their schools partially because they provide spaces for members of specific communities to communicate with one another and share

their experiences. Anther way to foster communication among LGBT youth is a keypal/penpal project. Participants would establish one-on-one email or postal correspondence with other youth outside their immediate communities, in order to provide peer support and exchange ideas about organizing in their schools.

DISPLAY CASES, MURALS AND ART INSTALLATIONS

Visual presentations can be very powerful, since they present a perfect opportunity for collaboration, and they're a great way to reach people who miss, for whatever reason, your events. How about a mural that depicts people being silent and silenced, with quotes about silence from LGBT leaders and leaders from other historical and contemporary social justice movements? Or a photography exhibit with pictures of people using their voices individually and collectively?

PUBLICATIONS

Has your group considered publishing a newsletter or zine, or even proposing a regular column in your school newspaper? Publications are a useful means of sharing information, provoking reflection and discussion and keeping people interested in your issues and activities.

ONLINE RESOURCES

If you have some web enthusiasts in your group, you may want to create a website where you can post information about your group, event notices and any other anti-LGBT bias content you find. It's especially important to keep in

mind your school and community climates when you consider doing anything online: the larger the audience, the more vulnerable you may be to unwelcome responses. Another idea is to host a listserv that enables email users to converse with one another in a closed forum. Since your group would control subscription to the listserv, it would be easier to protect participants from unsafe communications.

CONSUMER BOYCOTT

Boycotts are a powerful way of using your voice as a consumer. You can do research to learn about companies with policies and procedures that discriminate against LGBT people, and organize a boycott of their products or services. Be sure to contact the company you're boycotting to make it aware of your action, and to inform the media.

LETTER-WRITING AND EMAIL CAMPAIGNS

Letter-writing campaigns are another tried-and-true tactic of social justice movements. Begin by deciding who your target is. You could coordinate your letter-writing with your boycott, and target the presidents of the companies you're boycotting; or, you could target your representatives in local, state or federal government. By drafting a model or sample letter for others to copy or adapt, you can maximize participation. Either provide participants with addressee information, or address and mail their letters for them. When soliciting funds from local businesses for the Day of Silence, you could request a donation to cover postage for a follow-up letter-writing campaign.

PETITIONS

Petitions are a very effective organizing tool. It requires very little time for someone to read and sign a petition, and voila! You automatically get a contact list of supporters for your group! As with a letter-writing campaign, you should pick a specific target for your petition, and a concrete issue to support or problem to protest.

GSA/LGBT CLUB OPEN HOUSE

If you want to expand the membership of your group, why not build on the interest generated by the Day of Silence and invite people to an open meeting? You could plan a special program where you explain your mission statement, discuss your goals and provide an overview of your group's current activities.

QUESTION BOX/BULLETIN BOARD

Place a box for anonymous questions in a high-traffic area of your school. You'll probably want to find a locking box with just a small opening at the top. Post responses to the questions on a bulletin board.

CURRICULAR INCLUSION

It's likely that LGBT people and allies are invisible in your school's curriculum, especially if your teachers rely mainly on textbooks for source material. But if you're looking to add LGBT content to your school's curriculum, that doesn't mean you have to go out and buy a ton of LGBT books! There are lots of LGBT resources online that include extensive sections on LGBT history. With a little research, you could easily produce a list of ten ways your

school could incorporate LGBT people and history into its current curriculum. If you already have an ally on your school's faculty, enlist that person's assistance in brainstorming and determining the feasibility of your suggestions. Plus, the administration will be more open to a proposal that's already been endorsed by a faculty member. Check out the "Resource Center/Curricula" section of GLSEN's website (www.glsen.org) for ideas.

FACULTY FORUM

There are numerous ways your faculty could make their classrooms safer and more inclusive: responding quickly and decisively to harassment, using language that's inclusive instead of heterosexist, and coming out publicly as allies are just a few. Hold a meeting where faculty can express their ideas and concerns about your school's climate and LGBT inclusion, and where you can discuss your needs as students. You can also use the forum to share your ideas about curricular inclusion. It's much harder to ignore or refuse a request when it's made during an open, in-person dialogue (with witnesses)!

> "SILENCE SOMETIMES SPEAKS louder than words. Being silent not only allows you to feel how someone who is oppressed feels, but it also allows other to see what they are missing when they oppress others so that they cannot speak out. I decided to participate because it was an ingenious alternative to noisy rallies which seem to anger people, distracting from the overall meaning of the demonstration."

LIBRARY RESOURCES

If high schools even have LGBT resources at all, they're often silent and invisible, hidden in a counselor's office and

therefore only accessible to students seeking the help of the counselor. Many LGBT student groups have worked to acquire LGBT resource materials for their school libraries. Make a list of the resources you think would be most helpful to the students in your school community: LGBT history resources? Literature by LGBT authors? Social service and medical resources on topics such as coming out, safe sex, relationships and depression? Youth-produced books and zines? Once you've developed your list, request a meeting with your school librarian to discuss it. This is another action that could benefit greatly from the support of a staff ally.

LGBT PUBLICATIONS AND BUSINESSES

Depending on the bookstore/newsstand landscape of your town or city, LGBT magazines may be difficult to obtain. Luckily, some LGBT print publications have accompanying websites, and there are web-only publications as well. The best thing to do, for convenience's as well as safety's sake, is to search online. Once you've found some LGBT publications you like, contact them to request a free subscription for your school library. (Or, request a donated subscription for your silent auction.) Similarly, search for LGBT businesses that might be willing to donate funds, products or services to your activities.

III. HOW TO HANDLE ROADBLOCKS

WORKING WITH THE ADMINISTRATION

Many high school students and student groups will want and need the support of their administration to organize the Day of Silence. Find a supportive faculty member or member of the administration to help you plan your

outreach to the administration (perhaps the faculty advisor for a GSA or other student group). The following are suggestions for approaching the administration:

- Make an appointment to see the principal or Dean of Students at your school. Before your appointment, mail, fax or hand them some written information about the Day of Silence. You should include a letter stating why the day of Silence is needed at your school and why it is an important event for the students. The letter could even include a statement about why the Day of Silence is compatible with the school's curriculum (or what the Project is protesting in the curriculum) and which school organizations support the Project. Give administrators a Day of Silence Flyer, speaking card and the web address of the Day of Silence Project (www.dayofsilence.org).
- If you are uncomfortable going to the meeting alone, ask someone else to accompany you. Consider asking a teacher, community leader, relative, school staff member or anyone else who supports your proposal. Contact several people and explain the day of Silence to them and why/how you would like their help.
- Before you go to speak with administrators, make a list of the points that you want to make. This way, you'll know ahead of time what you want to say. You may want to rehearse the meeting beforehand with a friend or trusted adult. Try not to take on an offensive or defensive attitude; if you've been granted an appointment, you should expect

that the person you're meeting with at least will be open to hearing you out.

- Bring two copies of the letter you sent to the administrators to the meeting, one for yourself and one in case they didn't have a chance to read the letter, as well as an additional brochure or flyer. Present your budget and explain your cost expectations and fundraising strategy. Show your power by acting confident during the meeting. Remember, you have every right to meet with administrators and to be taken seriously.
- Points to make at your meeting should include: 1) why the Day of Silence is important to you personally; and 2) why it should be important to the school. Emphasize that the Day of Silence is a peaceful demonstration that is meant to enhance the educational environment of the school. Give administrators a basic idea of how much interest has already been expressed by individuals and groups, and what you expect in terms of participation. Make clear that the Day of Silence will be organized so that it will not disturb students' studies; suggest that students could do alternative assignments – such as writing reactions to readings – rather than speak in class during the day.

WHEN THE SCHOOL ADMINISTRATION SAYS "NO"

In high schools, approval from the principal or other appropriate staff is necessary to promote and implement any project. When approaching your school's administration, it helps to have the backing of a student club and your advisor(s). However, in the situation of your administration not

approving or supporting the Day of Silence, you may want to consider planning a community event outside of school, in the morning or evening. You may also want to consider other types of projects inside the school that would seek to educate the administration and/or decision-maker who has not allowed the Day of Silence to take place.

Another option when the administration does not approve the Day of Silence is to plan a campaign to influence the decision-maker. In earlier sections of the Organizing Manual, there are steps for organizing a campaign. Using this process, your group can work to change the decision. In this case, the problem is the not being allowed to have the Day of Silence take place in your school and the issue, or solution, is approval of the project. The decision-maker is whoever in your school or district is not allowing it to take place. Who are your allies? Who are other opponents? What are your resources? What are your strategy and tactics to influence the decision-maker to change her/his mind? Before starting any campaign to change the decision, you and your group will want to consider the impact of "challenging" an authority figure in your school. Work with your advisor(s) and other allies to do all the activities within the guidelines of the school. Especially in high schools, following established rules for student clubs or students will be crucial to the success of your campaign.

COPING WITH THE STRESS OF REMAINING SILENT

In a world where we rarely go nine minutes without talking to someone, being silent for nine hours can prove to be a challenging task. That's why it's important to take

care of your participants by keeping them well-informed, and providing them with opportunities to communicate their feelings about the Day.

BEFORE THE DAY OF SILENCE

We recommend that you hold a participants' meeting to talk about what the Day of Silence might look like and what people might expect. These meetings can consist of current organizers, and even past participants, talking about the logistics of the Day and handing out materials and guidelines. The meetings will bring together participants, creating an important support network. Many people feel more empowered and energized if they are connected to a communal effort.

DURING THE DAY OF SILENCE

The Day of Silence has the potential to be a solitary event; at large schools, participants may be dispersed, and remaining silent for nine hours can feel very isolating. In order to help participants throughout the day, you should set some support activities and safe spaces. One event could be a "silent lunch," which would promote visibility, publicity and participant unity. You should also establish a safe space, somewhere participants can visit if they are feeling stressed out during the day. The space should have snacks and someone to talk to, perhaps a supportive counselor or members of the LGBT organization. Taking care of participants should be a number one priority.

AFTER THE DAY OF SILENCE

People are going to have much to say once they begin to speak again, so it is important to have additional events,

such as a "Breaking the Silence" rally at the end of the day, or a more informal reflection gathering. See the "Additional Tactics" section for more specific ideas for events.

ADDRESSING HARASSMENT

If your school is hostile or resistant to LGBT issues, you may want to consider how the school community will react to your visible silence during the course of the day.

Some people may see others' silence as an opportunity for harassment. At your preparatory participants' meeting, you should discuss strategies for handling harassment from non-participants. While people are not usually harassed for participating in the Day of Silence, it is important to be prepared. Planning a strategy will make the harassment less scary and also decrease the likelihood of it escalating into a truly dangerous situation. Identify supportive faculty whom you can seek out when someone is harassing you. Talk with allies about intervening when they witness harassment.

Remember, everyone is negatively effected by bias and oppression. Work really hard to get allies involved. Allies can come from anywhere and everywhere, and the more allies you can get involved, the better. Ally participation can also help to create acceptance, since people will see people of all backgrounds and experiences supporting the event. At the same time, allies should be prepared to be the targets of anti-LGBT harassment, and participants should not assume that the presence of allies will protect them.

Find the pockets of your school that are supportive. Reach out into the surrounding community for support. This can be helpful both for your group and for the community.

Finally, consider whether participation in the Day of Silence is right for you and your school at this time. If your school is not ready to face the presence of LGBT individuals, you may want to find an alternative way to participate in the Day of Silence. There are many ways for you and your community to benefit from the Day no matter how you organize it.

ALTERNATIVE WAYS TO PARTICIPATE

Another hurdle people face when organizing the Day of Silence is actually maintaining the silence. You will find when you're outreaching that some people will balk at the idea of being silent for nine hours. They may have different reasons for not being able to be silent: students who need to talk to bring up their grade in a particular class, students who need to talk to their friends at lunch, or faculty who wish to participate but who need to speak during their classes.

Don't get frustrated, and don't give up on getting them to participate. Develop some creative ways for people to participate on their own terms. You might want to ask faculty to tape their lectures, or to make an announcement before class that they would participate if it weren't for the requirements of their job. You may make the rules more flexible, creating a "silent space" for an hour for teachers and administrators who wish to participate, for example. There certainly is space for "speaking roles": people to staff the safe room, or people who can be part of the

project team. Get those participants to post flyers, write press releases or maintain the list of participants. Be ready for people who want to participate without being silent, and make a list of other things they can do to help you out.

You probably will find that people will not be totally silent on the Day of Silence. The whole point is to raise awareness and make people think. A whole mass of totally silent people is ideal, but if there are a few exceptions, the point will still be made.

The best way to keep silent during and throughout the Day is to make sure they're reminded the day before and throughout the Day that they're supposed to be silent. If you do see participants talking, simply put your finger to your lips and give them a thumbs-up. Remember, it's important to be flexible and stay positive.

IV. BUILDING A MOVEMENT

CREATING A STUDENT ORGANIZER NETWORK

WHAT IS A STUDENT ORGANIZER NETWORK?

A student organizer network consists of students who are designated as the "point people" for specific "communities" within your school, and, in the case of a residential college, for specific areas on and around the campus. These students distribute materials, knock on doors and communicate with the people in their designated area. With a working student organizer network, a majority of the student body can be informed on an issue and asked to take action in a matter of days.

> "IT IS REALLY STUNNING when a group can get a wide enough participation. It is important

to use your voice, and so this is not the only step, but an important and large-scale one."

RECRUITING STUDENT ORGANIZERS

1. MAKE A LIST OF AREAS

Make a list of all the areas that will make up your student organizer network. What are the residence halls on campus, or the wings of your school building(s) that get the most student traffic? What is the best way to separate them into manageable areas for a student to handle?

2. MAKE A LIST OF COMMUNITIES

Make a list of all of the student "communities" in your school. What are all of the different ways students are arranged, or arrange themselves? (For example: by class, by homeroom, by family group, by club, team, organization or other group, by academic major, by academic division.)

3. STUDENT ORGANIZER PLEDGE SHEETS

It is important to make a simple pledge sheet that lays out what you are expecting students to commit to as student organizers. Below is a sample:

I, _____, pledge to do the following as a student organizer:

- Attend a student organizer training
- Distribute information in my area once a month
- Attend a monthly student organizer network meeting

Date: _____ Signature: _____

4. OUTREACH

Either call, email or visit the students on your prospect list. You should set up a student organizer network kickoff meeting for students who are interested in learning more; attending this meeting is the commitment you will ask of them when you first talk to them. At the meeting, your purpose will be to get students to commit to being student organizers, to pick an area of your campus or school to be responsible for, and to sign the pledge sheet.

5. STUDENT ORGANIZER TRAINING

Once a student has committed to being a student organizer, it is the experienced organizers' responsibility to train them and provide them with the resources they need to do the job. It is important that the first role a student takes on as a student organizer is easy and fun. A good first task is knocking on residence doors, or visiting appropriate building locations, to hand out fact sheets on the issue they're working on and introduce themselves. An experienced organizer should always go with them and demonstrate how to do this outreach, offering helpful advice along the way.

COORDINATING THE STUDENT ORGANIZER NETWORK

FOLLOW-UP

The way to make sure that student organizers are successful is through constant follow-up. The organizers who "mentored" them should take time regularly to check in with them and offer support, should provide many different tasks for the student organizer to do so that the

position remains fun and exciting, and should encourage them to provide input and suggestions for tasks they could take on.

REPORTING AND TRACKING

In order to have an effective student organizer network, you must have organizers document the work that they are doing. Tracking sheets are a useful reporting tool. One sheet can be for reporting on numbers: how many post-cards did they get signed this month, how many people did they talk to, how many students signed up to volunteer and so on. Another sheet can contain more detailed information about their interactions with other students.

MONTHLY MEETINGS

Scheduling a monthly meeting is what makes the network real. All of the student organizers get together to share their work and make plans for what work needs to get done the next month.

DEVELOPING LEADERSHIP

Students directly affected by anti-LGBT bias need to be able to advocate on their own behalf. Leaders of groups are often tempted to do the work themselves because it is faster than taking the time to include and assist others. The cost of not developing leaders is having a few students doing all the work and quickly burning out. The other consequence is that targets simply wait for the "loud mouth" organizers to graduate or leave school – thus waiting for the campaigns to die out.

It is up to students to make sure that student groups are sustainable, and student organizers are strong year after year. Student groups can be some of the strongest voices at your school, but they need to be developed and nurtured to grow and stay strong.

WHAT MAKES A LEADER?

Leaders are people who really "have people." This allows them to provide confidence and direction, and thus embody the will of the members. Leaders are the people who make themselves responsible for the well-being of the group, and they organize other students. They may or may not be elected, but are recognized by others as leaders because of the commitment they have made to the group and their experience in it.

No one can be a leader without wanting to be one. Motivation is necessary, but not enough, however. Charismatic leaders can inspire others to follow them, but don't necessarily have the skills needed, such as patience or attention to detail. They also may lack a deep understanding of the problems and issues. Thus, they can only organize as far as they can reach.

Sometimes there's a vacuum in leadership. In this case, look to the person who shows the necessary talent but never considered becoming a leader. Such a person can be the most valuable find. There are members that you rely on now, who can be cast into the leadership role by their own work.

When someone's considering a leadership role, there are usually two factors: the person's self-interest to do so, and the circumstances within and surrounding the group

that require new or more leaders. Leaders get benefits aside from working to create positive change; including respect, the satisfaction of showing their power, skills and in-depth education about the issues. When people discover they can do a whole range of things they never believed were possible, such as facilitating a meeting, writing an article, talking to people they have never met before, standing up to people in powerful positions and inspiring people, they want to see what else they can do.

A leader isn't just a symbolic figurehead – they prove themselves through organizing victories and by doing real work. Leadership tasks include: facilitating communication within the group, communicating and defending group decisions to others, initiating long-range plans, handling emergencies, making sure the group uses strategy, having the ability to develop and encourage others, fundraising and managing finances. In an LGBT anti-bias campaign, a leader must be sensitive to the issue, but also know how to turn fear and anger into positive progressive action that changes conditions at a school. It's not enough for someone to watch current leaders do and be these things. The work has to come from the prospective leaders. When a person fills these functions, other people start to think of that person as a leader.

Current leaders can help potential leaders show off strong points and develop weak ones. Make a list of their strongest skills, and assign leadership functions in those areas right away. List skills that need improvement, and slowly add responsibility in these areas, teaching and correcting along the way. Finally, list skills that people agree can't be improved. Find people with these skills to fill these particular gaps; for example, skills such as writing or fundraising.

HOW TO SUPPORT LEADERS

CREATE A SUPPORT GROUP FOR POTENTIAL LEADERS

Leaders need defined tasks, clarification of whom they are accountable to and when, and support that is organized and explicit.

ENCOURAGE AND ENABLE LEADERS TO BEGIN WITH THEIR STRENGTHS

If the leader's strongest skill is planning, for example, they should assume a leadership role at the end of one project and before the next. The new leader brings the new program. If instead the leader's strongest point is carrying out an activity for example, then the point of transition should come just after the start of a new program. If the leader is weak at facilitating meetings, for example, move the group away from a plan to adopt a constitution and bylaws during the transition.

FACILITATE LEADERS' OWN GROWN, AND THEIR DEVELOPMENT OF OTHER LEADERS.

Seek and give constructive feedback. The leader must feel that their greatest skills are what the group needs for its success. Make sure that leaders are enjoying their positions; if leaders are unhappy or frustrated with their positions, they can frustrate the people around them. Remember that every strong leader should be developing other leaders. People should not become so important that the group can't function without them.

APPENDIX S

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Docket No. 04-57037

TYLER CHASE HARPER, A MINOR, BY AND THROUGH HIS PARENTS, RON AND CHERYL HARPER

Appellant-Plaintiff,

vs.

POWAY UNIFIED SCHOOL DISTRICT, *et al.*

Appellees-Defendants.

On Appeal From the United States District Court
Southern District of California Civil Case
No. 04-CV-1103 The Honorable John A. Houston

SUGGESTION OF MOOTNESS

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VANDERVEEN, PENNY RANFTLE, STEVE MCMILLAN, ANDY PATAPOW, DONALD A. PHILLIPS, SCOTT FISHER, LYNELL ANTRIM, ED GILES and DAVID LeMASTER

TO ALL PARTIES AND THEIR RESPECTIVE ATTORNEYS OF RECORD HEREIN:

Defendants and Appellees Poway Unified School District, Jeff Mangum, Linda Vanderveen, Penny Ranftle, Steve Mcmillan, Andy Patapow, Donald A. Phillips, Scott Fisher, Lynell Antrim, Ed Giles and David Lemaster hereby inform the Court of a change in circumstances that may raise a question of mootness as to Appellant Tyler "Chase" Harper's appeal.

1. The Parties Have a Duty To Inform the Court of a Change in Circumstances That Raises An Issue of Mootness.

"It is the duty of counsel to bring to the federal tribunal's attention, *'without delay,'* facts that may raise a question of mootness." *Arizonans for Official English v. Arizona,* 520 U.S. 43, 68, fn. 23 (1997), emphasis in original, citing *Board of License Comm'rs of Tiverton v. Pastore,* 469 U.S. 238, 240 (1985) (per curiam). Under the law of the Ninth Circuit, this duty falls upon both parties. *Seven Words LLC v. Network Solutions,* 260 F.3d 1089, 1094 (9th Cir. 2001).

2. Chase Harper Has Graduated From Poway High School, Raising An Issue of Mootness As To His Appeal.

Plaintiff and Appellant Tyler "Chase" Harper claims that his constitutional rights were violated when Appellees refused to permit him to wear a T-shirt on his high school

campus stating, "Homosexuality is Shameful." The District Court denied Harper's motion for preliminary injunction to permit him to wear the shirt. On April 20, 2006, (and as amended on May 31, 2006) a three-judge panel of this Court affirmed the District Court's order denying the preliminary injunction, holding that the School's actions were not unconstitutional. Harper filed a petition for rehearing en banc on April 28, 2006, that is currently pending before this Court.

Chase Harper graduated from Poway High School on June 21, 2006. A true and correct copy of his Poway High School Diploma is attached as Exhibit "A" (a copy of the diploma was also filed with the U.S. District Court). As Harper is no longer a student attending school within the Poway Unified School District, his graduation may raise a question of mootness as to his appeal. See *Doe v. Madison School Dist. No. 321,* 177 F.3d 789 (9th Cir. 1999) (en banc) and *Cole v. Oroville Union High School Dist.*, 228 F.3d 1092 (9th Cir. 2000). Further briefing on the issue maybe required, given the Court's discretion in handling appeals that raise a question of mootness after an opinion has been published. See *Armster v. United States District Court,* 806 F.2d 1347, 1355 (9th Cir.1987).

DATED: July 20, 2006 STUTZ, ARTIANO, SHINOFF & HOLTZ, APC

By: /s/ Daniel R. Shinoff
Daniel R. Shinoff
Jack M. Sleeth, Jr.
Paul V. Carelli, IV
Attorneys for Defendants/Appellees, POWAY UNIFIED SCHOOL DISTRICT, ET AL.

EXHIBIT A

Poway High School

Poway [SEAL] California

This Certifies That

Tyler Chase Harper

Has satisfactorily completed the regular Course of Study prescribed by the State of California and the Poway Unified School District and is therefore awarded this

Diploma

Given this twenty-first day of June, two thousand six.

/s/ Don Phillips
Superintendent

/s/ Penny Ranftle
President, Board of Education

/s/ Scott Fisher
Principal

/s/ Linda Vanderveen
Clerk, Board of Education

Harper v. Poway Unified School District
USCA Docket No. **04-57037 (USDC, Southern District of California, 04 CV 1103)**

PROOF OF SERVICE
(State and Federal Court)

I am and was at all times herein mentioned over the age of 18 years and not a party to the action in which this service is made. At all times herein mentioned I have been employed in the County of San Diego in the office of a member of the bar of this court at whose direction the

service was made. My business address is 401 West A Street, 15th Floor, San Diego, California 92101.

On July 20, 2006, I served the following document(s):

1. **DEFENDANTS' SUGGESTION OF MOOTNESS**

☒ **BY MAIL** by depositing in the United States Postal Service mail box at 401 West A Street, San Diego, California 92101, a true copy thereof in a sealed envelope with postage thereon fully prepaid and addressed as follows:

☐ **BY OVERNIGHT COURIER** by depositing in the facility regularly maintained by FEDERAL EXPRESS at 401 West A Street, San Diego, California 92101, a true copy thereof in a sealed envelope with delivery fees fully provided for and addressed as follows:

☒ **BY FACSIMILE** by transmitting a facsimile transmission a copy of said document(s) to the following addressee(s) at the following number(s), in accordance with:

- ☐ the written confirmation of counsel in this action:
- ☐ [State Court motion, opposition or reply only] in accordance with Code of Civil Procedure section 1005(b):
- ☐ [Federal Court] in accordance with the written confirmation of counsel in this action and order of the court:

☒ **BY PERSONAL SERVICE** by delivery of a copy of said document(s) to the following addressee(s) as follows:

SEE ATTACHED SERVICE LIST
FOR TYPE OF SERVICE ON PARTIES

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on July 20, 2006, at San Diego, California.

/s/ Ilialona Charmagne Pine
Ilialona Charmagne Pine

SERVICE LIST

Counsel for Plaintiff: Robert H. Tyler, Esq. ADVOCATES FOR FAITH AND FREEDOM 32823 Highway 79 South Temecula, CA 92592 (951) 252-8140 Fax: (951) 296-5068 HAND DELIVERED 7/20/06	**Counsel for Plaintiff:** Charles S. LiMandri, Esq. Law Offices of Charles S. LiMandri 16236 San Dieguito Road Building 3, Suite 3-15 P.O. Box 9120 Rancho Santa Fe, CA 92067 (858) 759-9930 Fax: (858) 759-9938 SERVED BY MAIL 7/20/06
Counsel for Plaintiff: Kenneth C. Dickson, Esq. Law Offices of Kenneth C. Dickson 41486 Serrai Court Murrieta, CA 92562 (951) 677-8177 Fax: (951) 677-9800 SERVED BY MAIL 7/20/06	**Counsel pro hac vice for Plaintiff:** Kevin Theriot, Esq. ALLIANCE DEFENSE FUND 15192 Rosewood Leawood, Kansas 66224 Ph: (913) 685-8000 Fx: (913) 685-8001 SERVED BY MAIL 7/20/06

Counsel for Plaintiff (local counsel for Theriot/ADF): Timothy D. Chandler, Esq. ALLIANCE DEFENSE FUND 101 Parkshore Drive, Suite 155 Folsom, CA 95630 (916) 932-2580 Fax: (916) 932-2851 SERVED VIA FAX 7/20/06	**Counsel for Plaintiff:** Benjamin W. Bull, Esq. ALLIANCE DEFENSE FUND 15333 North Pima Road, Suite 165 Scottsdale, AZ 85260 (480) 444-0020 Fax: (480) 444-0028 SERVED BY MAIL

APPENDIX T

Exhibit 1

Poway High School

15500 Espola Rd. Poway, CA 92064-2299
(858) 748-0245

Administration

Principal ..... Scott Fisher
Assistant Principal ..... Lyn Antrim
Assistant Principal ..... Ed Giles
Assistant Principal ..... Kelly Burke
Athletic Director ..... Dan Crane
Activities Director ..... Matt Hannan
Attendance Supervisor ..... Damian Gonzales

Counselors

Vickie DeJesus
Tom Leighty
Rachel DeYoung
Debbi Easter
Janet Depew
Julie Roseneau

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CALENDAR OF IMPORTANT DATES 2004-05

AUGUST
26: School Starts

SEPTEMBER
6: Labor Day
14: Back To School Night

JANUARY
3: Return to School
17: Martin Luther King, Jr. Day
28: Semester Break

28: morP Fashion Show
29: Professional Growth Day

OCTOBER
2: morP dance
26: Titan Times

NOVEMBER
5: Homecoming Parade
5: Homecoming Game vs. Torrey Pines
6: Homecoming Dance
22-26: Thanksgiving Break
29: Professional Growth Day

DECEMBER
17: Band Holiday Concert/ Assembly
20: Winter Break Starts

FEBRUARY
12: Winter Ball Dance
21-25: District Recess

MARCH
18: Airband Assembly
18: Airband Competition
23: Professional Growth Day

APRIL
9: Flashback Dance
18-22: Spring Break
28: A-Team Awards

MAY
30: Memorial Day

JUNE
4: Senior Projects
11: Prom
22: Graduation + School is Out

* * *

6. Parents entering to see and/or sign a student out of class must be prepared to present proper identification.

7. Students may not be released to any person other than the parent/guardian without the parent/guardian's written consent on a DP-15 form.

Weekly Progress Reports: PHS participates in the district-wide *LearningPoint* program. Teachers are expected to post assignments and current grades on their *Learning-Point* sites on a bi-weekly basis. Go to www.learning point.org or www.powayusd.com for more information on how to log-on and use the system.

Withdrawal From Class: Withdrawal from a course made during the first 20 school days of a semester will not appear on the four-year card or report card. Any withdrawal from a

course initiated after the first 20 school days of a semester will be designated Withdrawal Fail (W/F). Exception to this procedure may occur only after review by the principal. The principal's waiver shall only be exercised in cases where extreme circumstances appear to have been beyond the control of the student. A W/F will be computed into the students GPA. Withdrawal from 6.5 Period classes must be made by the same 20 school day date, *not* after 20 class meetings.

Work Experience: Seniors who have a job can get school credit through Work Experience *(provided they request the class prior to the semester).* The student attends a class at PHS. The teacher in charge visits with the employer. Additionally, as new jobs become available, they are posted on a bulletin board outside the administration office. When jobs relate to specific courses, teachers who teach those courses are given copies of the announcement to have available for their students.

STANDARDS FOR STUDENT BEHAVIOR

Most students are very serious about wanting to take full advantage of the time they spend in school. Students who come to school to learn and participate in social activities seldom have problems with school rules. However, the behavior of a few students creates problems for everyone by interfering with teaching and learning. It is the intent of Poway High School and the Governing Board that District discipline policies and regulations be enforced consistently and fairly without regard to race, creed, color or sex. Discipline based on faith in the worth and dignity of each individual is a positive form of guidance. This section describes the major areas of problem behavior the

Poway Unified School District will not tolerate. Students who involve themselves in these problem areas will receive corresponding disciplinary action, also listed. In all cases of disciplinary action, students are protected by due process. **Students and parents should be aware that this only describes the major problem areas.** ***At any time,*** teachers or administrators may counsel students regarding their behavior. If this occurs, students will be informed as to what they must do to make their behavior acceptable. Possible consequences, if needed, will also be explained. The basic code of conduct is designed to support, not stifle students. We hope it will help provide students with a school they are proud to attend in an atmosphere where they have freedom to learn.

Behavioral Expectations: Striving for excellence is a Poway tradition. This excellence comes as a result of hard work and sacrifice by many students in a variety of roles. It is essential that students who represent Poway High School exhibit behaviors both on and off campus, which would not detract from, tarnish or mar the reputation of a team, program or school. They should, through their own high degree of citizenship, provide the role models necessary to maintain the high level of excellence and provide leadership for other student followers. Our student leaders should act as meaningful, productive members of society, showing good citizenship towards all. Failure to live up to these standards may result in students being removed from the position they hold. This includes all co-curricular activities, i.e., teams, clubs and offices.

SOCIALLY RESPONSIBLE BEHAVIOR

The Poway High School community believes that Socially Responsible Behavior (SRB) is crucial to improving and

maintaining a climate of respect. The Poway High School experience will enhance educational opportunities, prepare students for the workplace and allow all individuals to feel comfortable and secure. Staff, parents and students have developed guidelines for Socially Responsible Behavior during the school day and at all school sponsored events. Socially Responsible Behavior includes, but is not limited to the following:

A. **Public Display of Affection:** Physical intimacy is to be valued but should be shared discreetly and not showcased. In an effort to promote behavior which establishes a friendly atmosphere without causing others to feel embarrassment or discomfort, unacceptable are:

   1. Prolonged or heavy kissing
   2. Fondling/inappropriate sexual contact
   3. Excessive body contact

B. **Language:** Appropriate language enhances mutual respect and raises the level of comfort necessary for students and staff to perform at their best. The following misuse of written, spoken or gestured communication in any language is unacceptable:

   1. Obscene or profane
   2. Derogatory or intended to be racial, ethnic, religious, gender or sexual slurs intended to be hurtful or harassing in nature.

C. **Dress:** School clothing should be neat, clean, and appropriate for school activities and should follow the standards of common decency. The dress code will be enforced at all school-sponsored activities. Clothing that violates this standard is unacceptable, and the student in violation will be disciplined appropriately.

Examples of unacceptable dress are as follows:

1. Clothing that reveals or exposes undergarments. This includes any muscle shirts (underwear style).
2. Clothing that does not adequately cover the mid-riff, breasts, backs, or the buttock areas (No cleavage may be shown. Tube tops are unacceptable).
3. Clothing and accessories (including backpacks) that promote or portray:
   a. Drugs, alcohol and/or tobacco (420, 8-ball, mushrooms, etc.)
   b. Sex
   c. Gangs (numbered hats that denote an area)
   d. Weapons
   e. Violence or hate behavior including derogatory connotations directed toward sexual identity
4. Altered hats (acceptable hats are those that are mass produced and are worn as intended by the manufacturer).
5. Bandannas (worn or carried).
6. Wallet chains (worn or carried).
7. Belts or wrist-bands that have metal spikes.

Hats, beanies, hoods. etc. may not be worn inside any school building or classroom. They must be removed immediately upon entering any such building.

D. **Environment:** A clean, healthy and attractive campus is a shared responsibility. In order to provide a safe

and attractive environment, the following are unacceptable:

1. Litter – careless or intentional
2. Vandalism – defacing of or damage to school or private property, including:
   a. Tagging
   b. Graffiti
   c. Tree or shrub damage
3. Spitting

TRASH IS A SIGNIFICANT PROBLEM ON CAMPUS. YOUR HELP IS NEEDED TO KEEP OUR CAMPUS CLEAN.

RULES OF STUDENT DISCIPLINE

Students of the Poway Unified School District will be disciplined in accordance with Statutes of the State of California. A student will be subject to disciplinary action for the designated acts that are related to school activity and attendance and which occur at any time, including but not limited to any of the following:

- The student is on school grounds
- The student is going to or coming from school
- The student is on breaks or lunch periods whether on or off campus
- The student is going to, coming from or attending a school-sponsored or District-sponsored activity

The prohibited acts are:

1. Causing, attempting to cause, or threatening to cause injury to another person;

2. Possessing, selling, or otherwise furnishing to others any firearm, knife, explosive, or other dangerous objects such as, but not limited to, brass knuckles or slingshots;

3. Possessing, using having consumed, or being under the influence of alcohol, narcotics, dangerous drugs, or other controlled substances or intoxicants of any kind;

4. Transferring, selling, distributing, offering, arranging, or negotiating to sell, or possessing quantities sufficient to suggest the intent to provide, give or sell to other students, substances which are, or are purported to be, alcohol, narcotics, dangerous drugs, other controlled substances (i.e., marijuana, crystal methamphetamine, or anabolic steroids) or intoxicants of any kind;

5. Committing or attempting to commit robbery or extortion

6. Causing or attempting to commit to cause damage of school or private property.

7. Committing or attempting to commit theft of school or private property

8. Possessing or using tobacco or any products containing tobacco or nicotine on school premises;

9. Commission of obscene act, or engaging in habitual profanity or vulgarity.

10. Unlawfully possessing, offering, arranging, or negotiating to sell any drug paraphernalia as defined in §11014.5 of the Health and Safety Code.

11. Disruption of school activities or willful defiance of school authority;

12. Knowingly receiving stolen school or private property.

13. Possessing an imitation firearm.
14. Committing or attempting to commit sexual assault or sexual battery.
15. Threatening or intimidating a witness or a complaining witness in a school disciplinary proceeding.
16. Sexual harassment
17. Hate behavior/Violence
18. Possessing or using electronic signaling devices, including but not limited to pagers and signaling equipment.
19. Causing or attempting to cause an assault or battery on any school employee.
20. Violations of individual school rules.
21. Violations of bus riding rules.

Methods of discipline may include advice and counsel, warnings, work details, detention, in-school suspension (IS), Saturday school, suspension from bus riding, home suspension, rehabilitation contract, transfer to another school and expulsion from the Poway Unified School District.

Alcohol and Controlled Substances Use: Board Policy defines specific disciplinary action for the use of alcohol and controlled substances. A student will be subject to disciplinary action for the designated acts that are related to school activity and attendance and which occur at any time, including but not limited to any of the following:

- The student is on school grounds at a time when school is in session or a school-sponsored *activity* is in progress
- The student is going to or coming from school

- The student is on break or lunch periods whether on or off campus
- The student is going to, coming from or attending a school-sponsored activity.

PUSD Prohibited Acts #3, 4, 6	Disciplinary Action on 1st Offense	Repeated Offense
3. Possessing, using, having consumed, or being under the influence of alcohol, narcotics, dangerous drugs, other controlled substances or intoxicants of any kind.	Transfer to another high school, the continuation high school, or the Off Campus Independent Study program for a period of time of 90 school days or for the remainder of the semester and the following semester. Initiate an intervention contract. Notify Sheriff.	Recommend for expulsion
4. Offering, arranging or negotiating to sell any drug paraphernalia as defined in Section 11014.5 of the Health and Safety Code.	Transfer to another high school, the continuation high school, or the Off Campus Independent Study program for a period of time of 90 school days or for the remainder of the semester and the following semester. Initiate an intervention contract. Notify Sheriff.	Recommend for expulsion.

6. Transferring, selling, distributing, offering, arranging, or negotiating to sell, or possessing quantities sufficient to suggest the intent to purvey, give or sell to other students substances which are, or purported to be alcohol, narcotics, dangerous drugs, other controlled substances or intoxicants of any kind.	Recommend for expulsion. Notify Sheriff.	

Notification of Law Enforcement Authorities: The failure to make any report required by this section is an infraction punishable by a fine to be paid by the principal or principal's designee who is responsible for the failure.

Appeal Process: Students wishing to appeal disciplinary decisions should contact the Principal for information on specific procedures.

Assault: An "assault" is the unconsented to, unprivileged attempt, coupled with an apparent present intent and ability, to inflict immediate injury on the person of another, provided the intended victim is placed in fear of personal harm. "Assault is commonly referred to as an attempt to commit a "battery"

Battery: In general, battery is the unlawful touching or striking of another by the aggressor himself or by any substance put in motion by him, done with intent to bring

about a harmful or offensive contact which is not legally consented to by the other and not otherwise privileged. It is often stated that a battery is a consummated assault. Note that "battery" includes and implies assault, for there can be no battery without an assault – but an assault does not necessarily include a battery.

Challenge of Authority: All school staff members are in position of authority on campus and at any school related activity. Direct challenges or verbal abuse toward a staff member will result in disciplinary action. If the challenge or verbal abuse is considered a threat to a staff member, disciplinary action could result in arrest and possible expulsion from the Poway Unified School District.

Note: By law, students are required to do what is reasonably asked of them as long as the request does not cause physical or mental danger to them. If a student feels he/she is not being treated fairly, the student should refrain from arguing with the teacher and take the appeal to the Assistant Principal, Discipline.

Computer Hacking/Viruses: Computer hacking and/or the introduction of a computer virus violates school rules and will result in disciplinary action. Disciplinary action includes restitution, suspension, being dropped from computer classes with a W/F (Withdrawal/Fail) and the filing of a report with the police. Computer "hacking" is illegally entering a computer system. A computer "virus" is a program that once entered into a computer will destroy software and computer memory. Internet is for educational uses only. Students are to avoid sites which are inappropriate such as violence, hate, and sexual in nature.

Discrimination: Discrimination is negative or unfair treatment toward an individual based on race, ethnicity, sexual orientation, religion or gender.

It is against the rules for students to make nasty remarks that embarrass others or make them feel uncomfortable with actions or remarks that are sexual or racial in nature. Harassment on the basis of race, ethnicity, sexual orientation, religion or gender is a violation of both federal and state employment laws as well as District Policy and Administrative Procedures: (Title VII of the 1964 Civil Rights Act, the Educational amendments of 1972, Education Code §212.5 and Board Policy). The District is committed to providing students with an academic environment that is free from harassment and discrimination.

Disorderly Conduct: Inciting or instigating a fight or any other disturbance on campus will result in disciplinary action.

Drugs/Alcohol/Steroids: Possessing, using, having consumed or being under the influence of alcohol, narcotics, dangerous drugs, steroids or other controlled substances or intoxicants of any kind will result in transfer to another high school and/or will result in expulsion from the school district if this is a second offense. Possession of marijuana on the grounds of a public school during the hours in which school is open and offering instruction or programs for pupils K-12 is a misdemeanor. Minors may be punished on the first offense by a fine of up to $250. Second offenses and adult misdemeanors may be punished by a fine of up to $500 and/or ten days imprisonment

Electronic Paging Devices/Cellular Telephones:

The governing Board recognizes that instructional time is precious and must be protected from unnecessary disruption. However, the Board also acknowledges the importance of electronic communication between students and parents, particularly when students are involved with activities that keep them after school hours.

Therefore, students may be permitted to have in their possession a cellular phone/pager in school, on school property, at after-school activities, and at school-related functions provided that use of the cellular phone/pager does not disrupt the instructional process except as required by Education Code for medical reasons. In permitting use of such devices, the District assumes no liability for the loss or damage of the device or its misuse by another person. Cellular phones/pagers are not to be used for unlawful purposes.

Individual sites shall determine specific procedures for their students regarding the use of cellular phones/pagers during non-instructional times (i.e., breaks and lunch). These procedures must be developed in collaboration with the school community, which may include site councils, safety committees, parents, department chairs, school staff, and students. Poway High School adopted its policy in 2002. It was determined that cell phones are never to be used during the instructional day; specifically from the hours of 7:30am to 2:30 pm. Students in violation of this rule shall be subject to disciplinary action. *Parents or guardians may be responsible for picking up the cell phone from the discipline office for students who violate this rule.*

Explosives. Weapons and Related Devices:

1. Any student proven to be in possession of firecrackers or any other explosive device will be subject to suspension with consideration of expulsion.
2. Any student found guilty of setting off an explosive device will result in a suspension pending recommendation of expulsion.
3. Any weapons or simulated weapons brought on campus will be confiscated. The result could be possible arrest, prosecution and expulsion. Some examples are paint guns, pellet guns, B-B guns, nunchakus, etc.

A weapon, dangerous instrument, or replica weapon is any object which a reasonable person could perceive to be a weapon. Examples include, but are not limited to: gun, rifle, pistol, revolver, "zip gun", "stun gun", taser, dirk, dagger, ice pick, knife, razor, pipe bomb, time bomb, cap gun, containers of flammable fluids, B-B gun, pellet gun, spot marker gun, billy club, blackjack, slingshot, nunchaku, sandclub, sandbag, metal knuckles, or any metal plate with radiating points with one or more sharp edges, model gun, model rifle, model pistol, model semi-automatic weapon, toy gun, toy rifle, toy semi-automatic weapon and squirt gun.

A student discovering inadvertent possession of a dangerous object should immediately self-report such possession to a staff member in order for optional consequences to be considered.

Fighting: Actual or attempted injury to another person, that occurs during a hostile encounter. Mutual combat is when both parties are participants. For school purposes, "self-defense" is **not** fighting back. Self defense is the prevention of harm by blocking, holding or at best the

moving away from a fighter. An "eye-for-an-eye" is considered fighting, not self-defense.

Forgery: Falsely and fraudulently making or altering a document.

Gambling: Playing a game for property, wager or money or to stake something on contingency.

Harassment: Harassment is unwanted and unwelcome behavior from other students or staff members that interferes with another individual's life. When it is sexual in nature, it is "sexual harassment". When it is racial in nature, it is a "hate-motivated behavior" or sometimes a "hate crime".

Hate Behavior: Negative behaviors that target members of a particular gender, race, ethnicity, religion, sexual orientation, or the mentally or physically challenged will not be tolerated. Such behaviors may include, but are not limited to:

1. Name calling, racial slurs or bigoted epithets.
2. The presence of symbols or words considered offensive to persons of a specific gender, race, ethnicity, religion, sexual orientation or the mentally or physically challenged, such as graffiti, slurs or painted swastikas.
3. Activities historically associated with threats to persons of a specific gender, race, ethnicity, religion, sexual orientation or the mentally or physically challenged (e.g., burning crosses, wearing swastikas or white sheets, flying confederate flags, hanging effigies, defacing pink triangles).
4. The posting or circulation of demeaning jokes or caricatures based on negative stereotypes of a specific gender, race, ethnicity, nationality, religion, sexual orientation or mental or physical challenges.

5. The defacing, removal, or destruction of posted materials, meeting places, memorials, etc. associated with specific gender, race, ethnic, religious, sexual orientation or mental or physical challenges.
6. Victim belief that the incident was motivated by bias against him/her as a member of a specific gender, racial, ethnic, religious, sexual orientation or mentally or physically challenged group.
7. Perpetrator explanation/defense of incident involves exalting own gender, race, ethnicity, religion, sexual orientation or mental or physical status and/or includes statements demeaning victim group.
8. The presence of organized hate group literature and/or posters or reference to an organized hate group.

Hazing: Hazing in any form, including initiation, which is degrading is strictly forbidden by California State Law. No student shall conspire to engage in hazing, participate in hazing or commit any act that causes or is likely to cause bodily danger, physical harm, or personal degradation or disgrace resulting in physical or mental harm to any fellow student or other person. Persons violating this policy shall be subject to District discipline, misdemeanor penalties and forfeiture of entitlements.

Off Limits Area: During break and lunch, students have access to the main campus area. The areas considered "Off Limits" are:

1. Outer Perimeter *(outside yellow boundary lines; special access by permission only)*
2. Parking lots
3. Athletic fields
4. Tennis & racquetball courts
5. Any construction zone

- Public phones are off limits during class time, even with a pass from the teacher. In case of emergency, check with the Receptionist in the main office.
- Soft drink machines are not to be used during passing time or during class. *They may be used before and after school and during break and lunch.*
- Students are forbidden to climb fences as a form of access to or from the campus.

Search and Seizures: School officials have a duty to protect other students from the possible damages of contraband, such as weapons or drugs. Although student rights are of primary importance, when situations warrant, searches of vehicles, lockers, backpacks, purses, pockets and other personal belongings will be performed. "The legality of a warrant less search depends on the reasonableness under all circumstances of the search, including the following factors: whether the search was justified at its inception and whether, as conducted, it was reasonably related in scope to the circumstances that justified it in the first place." (New Jersey v. TOO, 1985) Our goal is to maintain a safe and orderly environment free of weapons, drugs or paraphernalia which can negatively influence the climate of our school. The District may also use specially trained non-aggressive dogs to sniff out and alert staff to the presence of substances prohibited by law or District Policy. The dogs may sniff the air around lockers, desks, bags, items or vehicles on District property or at District sponsored events as long as they are not allowed to sniff any person. Items shall not be sniffed if a person is close by. Inspections shall be unannounced and may be made at the discretion of the Superintendent or designee. Students and parents/guardians shall be

informed of this policy at the beginning of each school year. In all cases, students will be afforded due process.

Sexual Harassment

The Poway Unified School District recognizes that harassment on the basis of sex or gender is a violation of Federal and State discrimination laws as well as District Policy and Administrative Procedures. The District is committed to providing students with an academic environment free from sexual harassment, and will not tolerate such conduct on the part of any District employee, student, or other person at school or at a school sponsored activity.

Any person with a complaint of sexual harassment suffered by a student should implement the complaint process contained in the administrative procedures. **Retaliation or reprisals for reporting any incidents of sexual harassment, making any complaints, or being involved in the investigation process, are not permitted and will not be tolerated.**

The District will promptly and thoroughly investigate any complaints of sexual harassment, and will take immediate action to resolve such complaints.

The Poway Unified School District strictly prohibits harassment based upon gender or sex, against any student in the educational environment. Prohibited sexual harassment includes unwelcome conduct based upon sex or gender by someone who is of the opposite or same gender, a fellow student, a teacher or other employee of the District, a District administrator, or any other person, within the school, school environment or school sponsored activity. The law defines "sexual harassment" to mean

unwelcome sexual advances, requests for sexual favors, and other verbal, visual, or physical conduct of a sexual nature, made by someone from or in the educational setting, under any of the following conditions:

1. Submission to the conduct is explicitly or implicitly made a term or condition of an individual's academic status or progress; or
2. Submission, or rejection of, the conduct by the individual is used as a basis of academic decisions affecting the individual; or
3. The conduct has the purpose or effect of having a negative impact upon the individual's academic performance or of creating an intimidating, hostile or offensive educational environment; or
4. Submission to, or rejection of, the conduct by the individual is used as a basis for any decision affecting the individual regarding benefits and services, honors, programs or activities available at or through the educational institution.

Examples of unwelcome conduct which may be sexual harassment include, but are not limited to, the following:

1. Deliberate written or oral comments, gestures, or physical contacts of a sexual nature or demeaning to one's gender which are unwelcome or interfere with school productivity;
2. Implicit or explicit sexual behavior by a fellow student, District employee, or other person within the school environment which has the effect of controlling, influencing, or otherwise affecting the school environment;
3. Unwelcome suggestive, vulgar, or obscene letters, notes, posters, calendars, or other visual products,

or derogatory comments, slurs, and/or jokes of a sexual nature.

Retaliation: The Poway Unified School District strictly prohibits any retaliation and attempts or threats to retaliate against anyone for filing, reporting, pursuing, or participating in a complaint of sexual harassment, or for being a witness or helping in any other way relating to a complaint, potential complaint, or investigation of alleged sexual harassment. Any person who retaliates or attempts to retaliate in violation of this prohibition may be subject to discipline whether or not sexual harassment actually occurred and independently of this Administrative Procedure. Anyone with a concern that retaliation is or may be occurring is encouraged to contact the person investigating the charge of sexual harassment or the principal, assistant principal, or the District's Title IX Coordinator.

False Claims: No one shall file any claim of sexual harassment knowing it to be false, and no one shall provide any knowingly false information in a sexual harassment complaint or investigation. Anyone violating this prohibition may be subject to disciplinary action independently of this Administrative Procedure.

Procedures: These procedures are intended to provide timely and effective steps reasonably calculated to address concerns and allegations of sexual harassment, remedy any sexual harassment that occurred by ending it and preventing it from occurring again. All aspects of these procedures should be implemented with consideration of the gender, age, and maturity level of the student who is the complainant and respondent of alleged sexual harassment.

* * *

APPENDIX U

STUTZ, ARTIANO, SHINOFF & HOLTZ
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UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

TYLER CHASE HARPER, a minor, by and through his parents RON and CHERYL HARPER, Plaintiffs, vs. POWAY UNIFIED SCHOOL DISTRICT; JEFF MANGUM, LINDA VANDERVEEN, PENNY RANFTLE, STEVE MCMILLAN, and ANDY PATAPOW, all individually and in their official capacity as Members of the Board of the Poway Unified School District; DR. DONALD A. PHIL-	) Case No. '04 CV 1103 (JAH) (POR)) JUDGE: Hon. John A. Houston) CRTRM: 3) DATE: 8/26/04) TIME: 10:30 a.m.) **DECLARATION OF SCOTT E. FISHER IN SUPPORT OF DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION**

LIPS, individually, and in his official capacity as Superintendent of the Poway Unified School District; SCOTT FISHER, individually and in his official capacity as Principal of Poway High School; LYNELL ANTRIM, individually and in her official capacity as Assistant Principal of Poway High School; ED GILES, individually and in his official capacity as Vice Principal of Poway High School; and DAVID LEMASTER individually and in his official capacity as Teacher of Poway High School; and DOES 1 through 20 inclusive, Defendants.	) COMPLAINT FILED: 6/2/04) TRIAL DATE:

I, SCOTT E. FISHER, declare as follows:

1. I have been employed by the Poway Unified School District for the past 22 years. Currently, I am the Principal of Poway High School, and have served in that role for the past five years. I have personal knowledge of the facts contained in this Declaration. If called as a witness in this matter, I could competently testify to these facts.

2. On April 22, 2004, Assistant Principal Lynell Antrim came to me during the mid-morning telling me of a dilemma that she faced. The dilemma was how to treat a situation involving a printed tee-shirt which she thought to be inflammatory in nature. Because this was the day after the international Day of Silence, Ms. Antrim felt that

I might want to be involved with this situation. I told her that it was a good idea for me to see the young man, student Tyler Chase Harper ("Chase"), a sophomore at Poway High.

3. That particular day was celebrated as "Principal for a Day" in the Poway Unified School District, and I had a visitor on campus named Susan Conniry, an individual who had spent much of the morning with me and had sat in on a number of situations involving students. When Chase was brought to my office, I asked him if he had any problem with Ms. Conniry sitting in on our discussion, and he said he had no problem with that.

4. Chase shared what had happened in this situation much as he had with Ms. Antrim, that he had been sent to the office for wearing a T-shirt with masking tape on the front and back with handwritten messages stating "BE ASHAMED OUR SCHOOL EMBRACED WHAT GOD HAS CONDEMNED" on the front and "HOMOSEXUALITY IS SHAMEFUL" with very small print under it on the right side stating "Romans 1:27" on the back. Chase shared with me that it was important for him to wear this shirt in light of the fact that gay students were allowed to express their point of view school-wide during the Day of Silence and he believed that he needed to share his opposition to that stance. Chase was polite and respectful throughout our interaction, yet firm in his stance on this issue. The stance was that he did not want to remove his T-shirt or any of the taped messages on it for any reason.

5. Chase and I engaged in conversation regarding his reasons for wanting to wear this shirt, and he explained his rationale to me. He told me that his church has

a strong stance against homosexuality, and it was important to state this message at Poway High. I shared with him my concern that his shirt could very possibly be offensive to others, and was in violation of school policy relative to discrimination against sexual orientation of an individual on campus. I shared with him that it is our intent to avoid physical conflict on campus, and that it was my belief that his shirt was inflammatory. It is my stance that any shirt which is worn on campus which speaks in a derogatory manner towards an individual or group of individuals is not healthy for young people and in violation of school policy.

6. Chase told me that one reason that he knew that it was good that he had worn this shirt, was that he had already been confronted by a group of students on campus during the school day. He told me that he was involved in a tense verbal conversation with a group of students, thus it was clear that he had accomplished part of his objective.

7. After talking with Chase for some 20 minutes, it was clear that he was not to be deterred from his stance. I suggested some alternatives to his wearing the shirt and being in violation of our policy, and each of them were unacceptable to him. For example, I suggested that he continue to wear his shirt, yet remove the taped message that was on it. He disagreed with this recommendation. Next, I suggested that he keep his shirt on, yet wear another shirt over it, thus allowing him to continue to wear his shirt without the message being outwardly inflammatory toward others. Chase again told me that this was not satisfactory to him, and was willing to be suspended if need be. I also suggested the idea of a family member bringing him another shirt from home, yet he

rejected this as well. It was clear to me that my recommendations would not be accepted by him.

8. In making my decision that Chase should not be permitted to continue to wear the shirt on campus, I was mindful of the fact that during the previous year, there was tension on campus during the days surrounding the Day of Silence between certain gay and straight students. For example, an altercation had occurred which required me to physically separate the students. Those students were disciplined for their actions. So it was important for me to maintain both a safe campus and carry out the school's mission to teach respect of other students' beliefs.

9. After Chase suggested a second time that I might want to suspend him, I told him that that was not my choice, but that I preferred to take the lightest punishment to try to change a student behavior that I thought was in violation of school rules. I talked with him about my desire to have others be respected and he told me that he agreed with that philosophy. Our discussion ended with my telling Chase that I did not want him to be suspended from school, nor did I want him to have something in his discipline record because of a stance which he felt strongly about I told him that I did not feel that he had worn the shirt to be defiant, thus I did not feel inclined to punish him at this time. I told him that if he insisted on wearing the shirt that I would allow that, yet it would have to be in the front office for the remainder of the day. At no point was he formally suspended, and at no time was anything placed in his discipline file. He received full attendance credit for that day. Our discussion was pleasant and there was an air of respect between both parties.

10. Chase ultimately decided that spending the remainder of the day in the front office was an acceptable idea and that he would choose to do that. I told him that we could get his school work from his classroom, and allow him to continue to do school work through the end of the day so that he did not fall behind in his studies. I also let him know that if he wore the same shirt another time to school, that I would be forced to take more severe action because at that point in time it would be a defiance of school authority. Chase promised to honor my decision.

I declare under penalty of perjury under the laws of the United States of America and the State of California that the foregoing is true and correct and that this declaration was executed on August 12, 2004, in Poway, California:.

/s/ Scott Fisher
SCOTT FISHER

APPENDIX V

STUTZ, ARTIANO, SHINOFF & HOLTZ
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UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

TYLER CHASE HARPER, a minor, by and through his parents RON and CHERYL HARPER, Plaintiffs, vs. POWAY UNIFIED SCHOOL DISTRICT; JEFF MANGUM, LINDA VANDERVEEN, PENNY RANFTLE, STEVE MCMILLAN, and ANDY PATAPOW, all individually and in their official capacity as Members of the Board of the Poway Unified School District; DR. DONALD A. PHILLIPS, individually, and in his official capacity as Superinten-	Case No. '04 CV 1103 (JAH) (POR) JUDGE: Hon. John A. Houston CRTRM: 3 DATE: 8/26/04 TIME: 10:30 a.m. **DECLARATION OF LYNELL ANTRIM IN SUPPORT OF DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION**

dent of the Poway Unified School District; SCOTT FISHER, individually and in his official capacity as Principal of Poway High School; LYNELL ANTRIM, individually and in her official capacity as Assistant Principal of Poway High School; ED GILES, individually and in his official capacity as Vice Principal of Poway High School; and DAVID LEMASTER individually and in his official capacity as Teacher of Poway High School; and DOES 1 through 20 inclusive, Defendants.	) COMPLAINT FILED: 6/2/04) TRIAL DATE:

I, LYNELL ANTRIM declare as follows:

1. I have been employed by the Poway Unified School District for the past 28 years. Currently I am an Assistant Principal at Poway High School in charge of counseling, academic departments and dress code, and have served in that role for the past four years. I have personal knowledge of the facts contained in this Declaration. If called as a witness in this matter, I could competently testify to these facts.

2. The events concerning Tyler Chase Harper occurred on Thursday, April 22, 2004. This was the day after the "Day of Silence" that had occurred on the Poway High School campus. The Day of Silence is an activity put on by a school club on campus called the Gay-Straight Alliance ("GSA"). The focus of the Day of Silence is teaching tolerance of others, particularly those of a different sexual

orientation. The previous year, in April, 2003, the Day brought some volatile behavior between students, and there was an unsanctioned Straight-Pride Day a week or so later. No club organized that Straight Pride Day, but there were store-printed shirts with inflammatory messages and some hand-, scripted T-shirts with derogatory remarks. Some students last year were asked to remove the shirts and did so. Other students had an altercation and were suspended for their actions. This year, because of what occurred last year, there were clearer guidelines set by the administrators for the Day of Silence so as not to cause disruption in the educational environment. For example, I understand that Principal Scott Fisher met with the GSA to discuss administrative concerns about tension amongst students, and had the club "problem solve" these issues, continuing to work with him and the Associated Student Body director over the year.

3. On April 22, I recall that a student was sent to my office for a dress code violation. This occurred during a fourth-period class, the second instructional period of that Thursday. The student was waiting for me outside of my office and as I invited him in I noticed that he had masking tape across the front and back of his shirt and on the tape were hand-written words. Once inside of my office I read the messages which were "Be ashamed our school embraced what God has condemned" on the front and "Homosexuality is shameful" was on the back. There was also a Bible reference of "Romans 1:27" on the shirt. I asked the student his name and he told me he was Chase Harper. I thought the language on Chase's T-shirt was inflammatory under the circumstances and could cause disruption in the educational setting.

4. I told Chase that his shirt violated the dress code. At that point Chase, and I discussed his shirt, his concerns about the Day of Silence, and his wish to have his personal views on the homosexuality issue clearly stated. I told Chase that the Day of Silence was not about the school promoting homosexuality but rather it was a student activity trying to raise other students' awareness regarding tolerance in their judgement of others. I tried to explain my understanding about limited open forums and the student voice on campus under those guidelines.

5. Chase and I discussed ways that he and students of his faith could bring a positive light onto this issue without the condemnation that he displayed on his shirt. We discussed judging others and how that could cause problems in a high school setting. Chase was always polite in his conversation. I let him know that I could not allow him to go back onto campus with that shirt on. He could remove the taped-on statements from his shirt or I would give him another shirt to wear the rest of the day. This is how a dress code violation is handled in instances of inappropriate commentary. When the student returns the Poway shirt to me, I return his altered shirt. Chase said he was unwilling to change shirts, as he felt his message needed to seen.

6. I told Chase that his position took his actions from a dress-code violation to an act of defiance of authority, which could lead to further penalties. I explained that I had asked him, as a school official, to change his attire and he was refusing. He said that he understood and would accept the consequences.

7. I asked Chase to wait for a moment and I went to Mr. Giles' office to confer with him. Mr. Giles oversees

discipline at Poway High and I wanted to make sure that I was moving forward appropriately considering this was still about the Day of Silence from the day before. I explained the situation to Mr. Giles and he told me that Poway High had received a phone call from a gentleman that morning that was threatening regarding the Day of Silence and the gentleman said he was coming to the campus that day. Mr. Giles thought that Chase's T-shirt might be related and suggested that I see Scott Fisher, principal, to discuss this.

8. I went to Mr. Fisher's office and he was in a meeting. I interrupted his meeting and explained the situation. He said that he would be willing to meet with Chase and was quite sure that after he spoke with Chase that Chase would remove his shirt and the act of defiance would not be an issue. At that point I went back to Chase and let him know that he would be meeting with Mr. Fisher and escorted Chase to the appropriate office. I had no further discussions with Chase regarding his T-shirt.

I declare under penalty of perjury under the laws of the United States of America and the State of California that the foregoing is true and correct and that this declaration was executed on August 12, 2004, in Poway, California.

/s/ Lynell Antrim
LYNELL ANTRIM

APPENDIX W

STUTZ, ARTIANO, SHINOFF & HOLTZ
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UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

TYLER CHASE HARPER, a minor, by and through his parents RON and CHERYL HARPER, Plaintiffs, vs. POWAY UNIFIED SCHOOL DISTRICT; JEFF MANGUM, LINDA VANDERVEEN, PENNY RANFTLE, STEVE MCMILLAN, and ANDY PATAPOW, all individually and in their official capacity as Members of the Board of the Poway Unified School District; DR. DONALD A. PHILLIPS, individually, and in his official capacity as Superinten-	Case No. '04 CV 1103 (JAH) (POR) JUDGE: Hon. John A. Houston CRTRM: 3 DATE: 8/26/04 TIME: 10:30 a.m. **DECLARATION OF DAVID LEE LeMASTER IN SUPPORT OF DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION**

dent of the Poway Unified School District; SCOTT FISHER, individually and in his official capacity as Principal of Poway High School; LYNELL ANTRIM, individually and in her official capacity as Assistant Principal of Poway High School; ED GILES, individually and in his official capacity as Vice Principal of Poway High School; and DAVID LEMASTER individually and in his official capacity as Teacher of Poway High School; and DOES 1 through 20 inclusive, Defendants.	COMPLAINT FILED: 6/2/04 TRIAL DATE:

I, David Lee LeMaster, declare as follows:

1. I am employed by the Poway Unified School District and I am a History and English teacher at Poway High School. I have served in that capacity for the past two years. I have personal knowledge of the facts contained in this Declaration. If called as a witness in this matter, I could competently testify to these facts.

2. Tyler Chase Harper ("Chase") was a student in my 4th period class during the second semester of the 2003-2004 school year. On April 22, 2004, Chase attended my class, which began at 9:36 a.m. The class began in a typical manner in that the bell rang for class and students were in their seats promptly. Students were given instructions as to the task they were going to complete that period, which involved working with a partner student.

3. After several minutes of instruction I allowed the students to move around the class to join their partners. As I walked around the class assessing student performance, I noticed a T-shirt that Chase Harper was wearing which had white masking tape across the front and back with a message in hand-printed bold black lettering that read, "Be Ashamed: Our school embraced what God has condemned," and "Homosexuality is Shameful," followed by a citation to a Bible verse from the book of Romans. After seeing the shirt, I quickly looked around to see if its message had caused a disruption. It had: I observed several students off-task talking about content of "Chase's shirt" when they should have been working.

4. I immediately recalled events that happened the previous year around the time of the Day of Silence (a day in which students silently protest discrimination on the basis of sexual orientation). At that time, anti-homosexual speech resulted in personal conflicts and I understood that several suspensions had been made as result of the conflicts. So I knew there had been previous tensions between students on either side of the sexual orientation issues, and wanted to prevent any student conflict.

5. As a second-year teacher at Poway High School, I was familiar with the dress code on our campus and had sent past students to the office who were in violation of said code. My policy is simple and consistent in that if a student is believed to be in violation of the dress code, he or she is offered the option of removing the article in question or going to the office if the student cannot or refuses to remove the item. Furthermore, if a student's behavior or clothing causes a class disruption or believe it to create a hostile environment, I also respond with the

above mentioned action for administrative intervention. This is exactly what happened on April 22.

5 [sic]. Once the class assignment had been completed and students were going back to their seats, I politely asked Chase to step outside so we could talk. Once outside, I explained to Chase that in my professional opinion the handmade addition to his T-shirt created a negative and hostile working environment for others and that the tape needed to be removed, or he could argue his case with the administration. He asked what about his shirt violated the dress code, and I explained that because it was inflammatory and that it was an addition to his shirt, I believed it to be a violation. He then asked if he could go up to the front office to speak with an administrator at which time I gave him the dress-code-violation card we use for such incidents. Chase then left my class to go to the administration office.

I declare under penalty of perjury under the laws of the United States of America and the State of California that the foregoing is true and correct and that this declaration was executed on August 11, 2004, in Poway, California.

/s/ David Le Master
David Lee LeMaster

APPENDIX X

STUTZ, ARTIANO, SHINOFF & HOLTZ
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UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

TYLER CHASE HARPER, a minor, by and through his parents RON and CHERYL HARPER, Plaintiffs, vs. POWAY UNIFIED SCHOOL DISTRICT; JEFF MANGUM, LINDA VANDERVEEN, PENNY RANFTLE, STEVE MCMILLAN, and ANDY PATAPOW, all individually and in their official capacity as Members of the Board of the Poway Unified School District; DR. DONALD A. PHILLIPS, individually, and in his	Case No. '04 CV 1103 (JAH) (POR) JUDGE: Hon. John A. Houston CRTRM: 3 DATE: 8/26/04 TIME: 10:30 a.m. **DECLARATION OF EDWARD L. GILES IN SUPPORT OF DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION**

official capacity as Superintendent of the Poway Unified School District; SCOTT FISHER, individually and in his official capacity as Principal of Poway High School; LYNELL ANTRIM, individually and in her official capacity as Assistant Principal of Poway High School; ED GILES, individually and in his official capacity as Vice Principal of Poway High School; and DAVID LEMASTER individually and in his official capacity as Teacher of Poway High School; and DOES 1 through 20 inclusive,	) COMPLAINT FILED: 6/2/04) TRIAL DATE:
Defendants.	

I, Edward L. Giles, declare as follows:

1. I have been employed by the Poway Unified School District for the past five years. Currently I am an Assistant Principal at Poway High School in charge of student discipline, and have served in that role for the past two years. I have personal knowledge of the facts contained in this Declaration. If called as a witness in this matter, I could competently testify to these facts.

2. On Thursday, April 22, 2004, sometime between 9:36 and 11:22 a.m., another Assistant Principal, Lyn Antrim, notified me of a possible student dress code violation she was dealing with and asked for my input. Ms. Antrim informed me a male student was wearing a shirt with what she thought was inappropriate language on it, and that the student had refused to remove the

writing and/or change shirts. I recall walking down the hall within the Poway High administration offices to Ms. Antrim's office to meet the young man and make an observation of the wording.

3. When I arrived outside Ms. Antrim's office, I saw Tyler Chase Harper ("Chase") wearing a T-shirt that had some sort of masking tape across the chest and mid-back areas. Handwritten on the masking tape on the front of the shirt were the words "BE ASHAMED OUR SCHOOL EMBRACED WHAT GOD HAS CONDEMNED." On the back was written "HOMOSEXUALITY IS SHAMEFUL."

4. I suggested to Ms. Antrim that the situation be brought to the attention of our principal, Mr. Fisher due to a telephone call Fisher had received that very morning. What had happened was that at the start of school that day, approximately 7:40 a.m., Mr. Fisher had asked me to make contact with our assigned deputy sheriff, Norm Hubbert, and get him on campus as soon as possible. Mr. Fisher wanted the officer on campus immediately as he was concerned for his safety and that of our campus. Mr. Fisher went on to tell me he had just received a phone call from someone who would only identify himself as a parent. Apparently this person was very upset about the school's "condoning" of the Day of Silence the day before (on April 21, 2004). Mr. Fisher reported that the parent said that he and several other parents had "had it" and "would be doing something about it". When I read the language on Chase's T-shirt I wondered if there might be a connection between it and the phone call received by Mr. Fisher. At this point I returned to my office and attended to other issues of the day.

5. Just b[illegible]e lunch on Thursday, April 22, 2004 (approximately 11:20 a.m.) Chase was escorted to the discipline office by Mr. Fisher. Mr. Fisher informed me that he had asked Chase to remove the writing or the shirt itself, and Chase was refusing to do so. Mr. Fisher then explained to Chase that he would have to be held out of class, but that this was not a suspension – he just wouldn't let Chase attend his afternoon class, while wearing the shirt in it's current state.

6. I placed Chase in the conference room adjacent to the discipline office within the administrative offices. I prepared to leave for my lunch supervision out on campus. I had a campus supervisor, Elaine Durham, check with Chase to see what he wanted brought in for lunch. Chase told the supervisor he wasn't hungry at that time.

7. Upon leaving I noticed Chase had a Bible reference on his shirt in smaller print next to the words "HOMOSEXUALITY IS SHAMEFUL" that read "Rom. 1:27." This was of interest to me so I asked him who his youth pastor was and what church he attended. He told me he attended Maranatha Chapel. I was interested in this because I too attended that church until about a year ago. As I left for my supervision responsibilities I realized that I knew Chase's father and had an idea of where Chase was coming from.

8. During lunch supervision I found Mr. Fisher and informed him of my discovery of who Chase is and who his family is. I told Principal Fisher I knew Chase's father personally and had attended Biblical studies that Chase's father had led on Tuesday nights. I told Scott Fisher in my opinion this is a solid family, fair, and friendly. I asked him

if he had called them as of yet. He said he hadn't and thought it best I called Mr. Harper since I knew him.

9. After lunch, (approximately 12:05 p.m.), I met with Chase and informed him I would be calling his parents and asked him who he thought best to call. Chase said I should call his father. So I contacted Mr. Harper and explained the situation as I knew it. Mr. Harper stated he wasn't aware Chase had worn a shirt with that language. He said he knew Chase had mentioned doing something last year, but wasn't aware he had done this. Mr. Harper asked for clarification of what exactly was wrong. I told Ron Harper of our concern for the safety of our students when they altered their clothes to carry messages that could be inflammatory or demeaning. I told him we had some situations in the past of physical altercations because someone took exception to a message concerning sexual orientation on another person. I explained to him we did not want messages that carried with them a negative tone.

10. Mr. Harper seemed to understand my position, but he indicated that he felt his son had a right to express his belief on the homosexual issue since Poway High School permitted the Day of Silence on campus the day before. Mr. Harper informed me he thought his son's rights were being taken away. I informed him of the balanced position we have taken as a school to ban "hand-made" "altered clothing" that was used primarily to be negative and could incite a reaction from opposing positions on either side of an issue.

11. Also, Mr. Harper wanted to know what was happening to Chase and if he needed to come and pick him up. I told him Chase was being held out of his afternoon

class because he refused to remove the writing and Mr. Fisher would not allow him to be out on campus. I told him he could come and get Chase or Chase could stay in the discipline office for the remainder of the day. Mr. Harper said Chase could stay at school.

12. After my conversation with Mr. Harper I informed Chase that he would have to stay in the conference room and asked him if he had any school work to complete. He informed me he had his work with him. Chase remained in the conference room for the last period of the day.

13. That day was a lab day, as per the daily bell schedule, and school would be concluded at 1:45 p.m. with tutorial following. As the day was conning to an end I knew it was a pretty eventful day for Chase and out of respect to he and his family I wanted to make sure he was alright and understood the position the school had taken. At approximately 1:30 p.m. I asked Chase to come into my office. Chase and I talked for about 10-12 minutes.

Here is what we discussed:

- I told Chase I really didn't know him before then, but when I saw the scripture reference on his shirt I knew he was fairly grounded in his faith. I told him I knew his father and that I had even attended his church. I told him I understood "where he was coming from"; however, I would hope he could express himself in a more positive way.
- I told him I shared the same faith he has and that I too am a Christian. However, as an employee of the State of California when I come to school each day I have to watch how I express my beliefs and as Mr. Pack often says we leave our faith in our cars – right out there in the parking

lot. I did not ask Chase to leave his own faith in the car, as I was speaking as an employee and in a metaphor. As an aside, in my mind, one's faith can not be left outside of one's person – as air can not be left outside of our lungs. But how we express our beliefs and opinions should be guarded as not to cause an offense to others.

- I asked Chase if he could think of a more positive way to express himself. I asked him if he had considered being an active member of the Bible Club (First Priority) here on campus. I challenged him to consider being an officer and sponsoring some activity that would express his opinions in a positive way on the campus.
- I reminded Chase that no matter what he thought of the Day of Silence the Gay Students Association was a recognized club on campus and its officers had gone through proper channels to have their events approved. I asked him to consider other alternatives that would be more positive and non-confrontational.

14. Chase's day was coming to an end so I told him that the written messages on his shirt could cause a reaction after school so it would be in his best interest to go directly off campus. I had no further interaction with Chase concerning these events.

I declare under penalty of perjury under the laws of the United States of America and the State of California that the foregoing is true and correct and that this declaration was executed on August 11, 2004, in Poway, California.

/s/ Edward L. Giles
EDWARD L. GILES

OPPOSITION BRIEF

(2)

No. 06-595

IN THE

Supreme Court of the United States

TYLER CHASE HARPER, a minor, by and through his parents RON HARPER, *et ux.*, *et al.*,

Petitioners,

v.

POWAY UNIFIED SCHOOL DISTRICT, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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I. ISSUES

A California high school student wore a shirt to school with a message reading "Homosexuality is Shameful." Mindful of the school's history of problems involving the interactions of straight and gay students on campus, the school administrators deemed the shirt to be inflammatory and demeaning, and would not permit the student to wear it on campus. The student sued the school for violation of his free speech rights. The Ninth Circuit ruled in the school's favor, affirming the District Court's denial of the student's motion for preliminary injunction.

1. Have the Petitioners shown compelling reasons to grant the Petition, given that the case involves an interlocutory appeal, where the remainder of the case is currently being litigated before the District Court, and where this Court has recently granted certiorari in another student speech case that may affect the future analysis of this case?

2. Have the Petitioners shown compelling reasons to grant the Petition, where the Ninth Circuit followed long-standing Supreme Court precedent in analyzing the evidence in the case and holding that the First Amendment does not prevent a school from stopping a student from demeaning other students because of their sexual orientation?

3. Have the Petitioners shown compelling reasons to grant the Petition, where the Ninth Circuit's holding in this case is not in conflict with the holdings of other Circuits because no other Circuit has analyzed and ruled on an "as applied" constitutional challenge under the "rights of others" prong of *Tinker v. Des Moines School Dist.*, 393 U.S. 503, 21 L. Ed. 2d 731, 89 S. Ct. 733 (1968)?

II. INTRODUCTION

Although students enjoy First Amendment protections, those protections are not unlimited. Over the past forty years, this Court has explained that student speech may be restricted where it disrupts the learning environment, or collides with the rights of other students to be secure and let alone, or offends the sensibilities of other students.

Consistent with this jurisprudence, the Ninth Circuit, in a 2-1 decision, held that a school does not offend the First Amendment by preventing a student from putting down homosexual students by wearing a T-shirt on campus reading "Homosexuality is Shameful." In doing so, the Ninth Circuit ruled that students who may be injured by attacks on their core personal characteristics, such as race, religion, and sexual orientation, have the right to be secure and let alone. The Ninth Circuit was correct: speech that harasses another on the basis of a group status should not be afforded First Amendment protections in the school setting. Students should be able to learn without fear of being harassed because of who they are, especially during critical formative years. Teachers should teach civil values to students, such as how to express an opinion without being demeaning to others.

The school administrators in this case told the student that he could change the tone of the shirt and leave out the direct attack on other students. The student refused. That is not viewpoint discrimination; it is a school trying to teach common courtesy. Even Judge Kozinski's Dissenting Opinion "ha[s] sympathy for [the] position that students in school are a captive audience and should not be forced to endure speech that they find offensive and demeaning." Pet. App. 77a. The fact that the speech at issue in this case carries with it the shadow of a political viewpoint is not determinative. Teachers and administrators are in the best position to decide what speech is so inflammatory

that it invades the rights of others by creating a hostile learning environment. That is what the law currently provides. The Petition should be denied.

III. STATEMENT OF THE CASE

Petitioners have distilled and presented their facts solely from their own perspective. They have omitted much of the evidence presented by the Respondents— evidence that was considered by the District Court and the Ninth Circuit and was found to be convincing. Petitioners' recitation of the facts is a far cry from the Ninth Circuit's statement of facts.

Perhaps the wide disparity in the factual versions of events from the Petitioners and Respondents' relative perspectives is reason enough to deny the Petition, given that the District Court currently has the entire case before it, and the issues of fact will be resolved by the Court or jury in the near future.

A. Petitioners' Beliefs.

At the time of the incident, Tyler "Chase" Harper was a 16-year-old sophomore enrolled in Poway High School, which is operated by the Poway Unified School District ("District" or "School"). Pet. App. 148a-149a. Chase and his sister Kelsie (currently a junior at Poway High) are Christians who believe that homosexuality is immoral and demonstrably contrary to the teachings of the Bible, which they believe is the inspired Word of God. Pet. App. 148a.

B. A Poway High Student Club Promoted a "Day of Silence" to Encourage Tolerance of Others; The High School Had A History of Trouble Surrounding Gay-Lesbian Issues and the "Day of Silence."

Sometime prior to April 21, 2004, Chase learned of a planned "Day of Silence" at the High School. Pet. App. 149a. The "Day of Silence" was not actually sponsored by the School as Harper contends, but rather was permitted by the School as

an activity sponsored by a School club, the "Gay-Straight Alliance." Pet. App. 346a. Although Petitioners allege that the "Day of Silence" was organized to "demonstrate support for individuals engaged in overt homosexual lifestyles and behavior," the Day was actually intended, in the words of Poway High Assistant Principal and Respondent Lyn Antrim, to "teach tolerance of others, particularly those of a different sexual orientation." Pet. App. 148a, 346a-347a.

The year before, there had been problems during the "Day of Silence." The problems were part of a history of conflict among Poway High students over issues of sexual orientation. For example, two former Poway High students recently won a suit against the District for failing to protect them from students who harassed them because they are gay. During that trial, one of the students testified that Poway High students repeatedly called him names, shoved him in the hallways, threw food at him and spit on him, and that he heard other students make disparaging remarks about gays and lesbians on a nearly daily basis. Pet. App. 5a.

More specifically, during the days surrounding the 2003 "Day of Silence," a series of incidents and altercations occurred on the school campus as a result of anti-homosexual comments that were made by students. One such confrontation required Principal Fisher to separate students physically. Pet. App. 343a. According to Respondent David LeMaster, a teacher at Poway High, several students were suspended as a result of these conflicts. Pet. App. 352a. Moreover, a week or so after the "Day of Silence," a group of heterosexual students informally organized a "Straight-Pride Day," during which they wore T-shirts which displayed derogatory remarks about homosexuals. Pet. App. 347a. According to Ms. Antrim, some students were asked to remove the shirts and did so, while others "had an altercation and were suspended for their actions." Pet. App. 347a.

C. Chase Harper Decided to Create and Wear a T-shirt to School.

Chase decided to prepare a T-shirt to oppose the 2004 "Day of Silence." On April 21, 2004, the date of the "Day of Silence," Chase wore the T-shirt to school. He hand wrote "I WILL NOT ACCEPT WHAT GOD HAS CONDEMNED," on masking tape on the front of the shirt and "HOMOSEXUALITY IS SHAMEFUL. Romans 1:27" on the back. Pet. App. 149a. There is no evidence in the appellate record that the shirt was exposed to others, or that the staff saw the shirt that day.

The next day, April 22, 2004, Chase wore another T-shirt to school with handwritten words on masking tape, except that the message on the front was changed to read: "BE ASHAMED" "OUR SCHOOL EMBRACED WHAT GOD HAS CONDEMNED," while the message on the back remained: "HOMOSEXUALITY IS SHAMEFUL. Romans 1:27." Pet. App. 347a. The citation to Romans 1:27 was written in tiny print adjacent to main message. See photograph at Pet. App. 46a.

D. The T-Shirt Was Disruptive In the Classroom, and The School Staff Believed It Was Inflammatory And Disparaged Others.

1. Chase's teacher noticed the T-shirt and the disruption it caused.

Respondent LeMaster, Chase's second-period teacher, noticed Chase's shirt and observed "several students off-task talking about" the content of the shirt. Pet. App. 352a. LeMaster, recalling the altercations that erupted as a result of "anti-homosexual speech" during the previous year's "Day of Silence," explained to Harper that he believed that the shirt was inflammatory, that it violated the School's dress code, and that it "created a negative and hostile working environment for

others." Pet. App. 353a. When Harper refused to remove his shirt and asked to speak to an administrator, LeMaster gave him a dress code violation card to take to the front office. *Id.*

2. Chase meets with Assistant Principal Antrim.

Once at the office, Chase met with Assistant Principal Antrim. Chase and Antrim discussed Chase's shirt, his concerns about the "Day of Silence," and his wish to have his personal views on the homosexuality issue clearly stated. Pet. App. 348a. Antrim told Chase that the "Day of Silence" was not about the school promoting homosexuality but rather it was a student activity trying to raise other students' awareness regarding tolerance in their judgement of others. *Id.* Antrim told Chase that his shirt violated the dress code. Antrim believed that Harper's shirt "was inflammatory under the circumstances and could cause disruption in the educational setting." Pet. App. 347a-348a. Like LeMaster, she also recalled the altercations that had arisen as a result of anti-homosexual speech one year prior. Antrim discussed with Chase "ways that he and students of his faith could bring a positive light onto this issue without the condemnation that he displayed on his shirt." Antrim was also concerned that the shirt might have been related to a threatening telephone call concerning the "Day of Silence" that the school office had received that morning, and so she directed Chase to the Principal. Pet. App. 349a.

3. Chase meets with Principal Fisher.

Chase then met with the Principal, Respondent Scott Fisher. Principal Fisher and Chase engaged in conversation regarding Chase's reasons for wanting to wear this shirt. Pet. App. 341a-342a. Fisher shared his concern that Chase's shirt could very possibly be offensive to others, and was in violation of school policy relative to discrimination against sexual orientation of an individual on campus. Pet. App. 342a. Fisher also shared with Chase that it is the school's intent to avoid physical conflict

on campus, and that it was his belief that the shirt was inflammatory and could not be worn on campus. *Id.* Fisher proposed some alternatives to wearing the shirt, all of which Chase turned down. *Id.* Fisher ultimately decided that Chase could not wear the shirt on campus, having taken into account the fact that during the previous year, there was tension on campus during the days surrounding the "Day of Silence" between certain gay and straight students. Pet. App. 343a. In short, Fisher felt that Chase's shirt conflicted with the maintenance of a safe campus and carrying out the school's fundamental mission to teach respect of other students' beliefs. Pet. App. 342a.

Chase told Fisher that it was good that he had worn this shirt, because he had already been confronted by a group of students on campus during the school day. Pet. App. 342a. Chase said he was involved in a tense verbal conversation with a group of students, and thus it was clear that he had accomplished part of his objective. *Id.*

Chase twice asked Fisher to suspend him. Pet. App. 342a-343a. Fisher declined, telling Chase that if he insisted on wearing the shirt that it would have to be in the front office for the remainder of the day. Pet. App. 343a. At no point was Chase formally suspended, and at no time was anything placed in his discipline file. *Id.* Chase received full attendance credit for that day. *Id.* Chase ultimately decided that spending the remainder of the day in the front office was an acceptable idea and that he would choose to do that. Pet. App. 344a. Fisher told Chase that he could get his school work from his classroom, and continue to do school work through the end of the day so that he did not fall behind in his studies. *Id.* Fisher also let Chase know that if he wore the same shirt another time to school, Fisher would be forced to take more severe action because at that point in time it would be a defiance of school authority. Chase promised to honor Fisher's decision. *Id.*

4. Deputy Sheriff Norm Hubbert speaks with Chase.

While Chase was in the conference room, San Diego County Deputy Sheriff Norm Hubbert, who was serving in his role as the school resource officer, spoke with him. Pet. App. 6a. Hubbert was on campus that day because someone, purporting to be a parent, had called the School that morning complaining about the School's "condoning" the "Day of Silence," and stated that "he and several other parents had 'had it' and 'would be doing something about it.'" *Id.* Chase contends that Hubbert's discussion with him was an "interrogation," but it was nothing of the sort. Hubbert "had a casual conversation concerning the content of the shirt," and a "discussion of the Bible and scripture reference on the shirt." *Id.* The conversation arose out of simple curiosity on Hubbert's part to understand the situation. *Id.*

5. Assistant Principal Giles's discussion with Chase at the end of the day.

After Fisher made the decision that Chase would not be permitted to wear his T-shirt on campus, Assistant Principal and Respondent Ed Giles supervised Chase. Giles told Chase that he would have to stay in the office conference room and asked him if he had any school work to complete. Chase said that he had his work with him, and he remained in the conference room for the last period of the day. Pet. App. 359a.

Giles had discovered earlier in the day that Chase attended the same church that he had previously attended. Pet. App. 357a. Giles knew Chase's father personally and had attended Biblical studies that Chase's father led on Tuesday nights. *Id.* Near the end of the school day, out of respect to Chase and his family, Giles spoke to Chase to make sure he was alright and understood the position the school had taken. Giles told Chase that he understood "where he was coming from" but wished that he could "express himself in a more positive way." Pet. App. 359a. Giles also said that he shared the same Christian faith as Chase.

Id. Giles suggested that Chase think of a more positive way to express himself, and asked him if he had considered being an active member of the Bible Club on campus. Pet. App. 360a. Giles told Chase that as an employee of the State of California when he comes to school each day he has "to watch how I express my beliefs and as Mr. Pack [another administrator] often says, we leave our faith in our cars - right out there in the parking lot." Pet. App. 359a-360a. Contrary to Chase's contention, Giles did not ask Chase to leave his own faith in the car, as Giles was speaking as an employee and in a metaphor. Pet. App. 360a.

Chase left the office at the end of the day without incident. He graduated from Poway High School in June, 2006. Pet. App. 314a.

E. Petitioners Have Included Facts in the Petition That Are Not In the Appellate Record, And Are Currently Before the District Court.

Within the Petition and its appendix, Petitioners have included material not in the appellate record. This material pertains to a Poway High School website, and several other third party web sites that have links on the Poway High site. Pet. App. 195a – 229a. Evidence concerning the Poway High website, how it arose, how the links were determined, and why it is constitutional, was presented by Respondents to the District Court in opposition to the Harpers' motion for summary judgment. The District Court has not decided that motion, nor the Respondents' cross-motion, as of the time of the filing of this Opposition. Those facts were never before the Ninth Circuit, nor before the District Court in its ruling on the motion for preliminary injunction.

F. Procedural Posture.

1. The initial complaint and motion for preliminary injunction.

Chase filed a Verified Complaint and Demand for Jury Trial with the U.S. District Court for the Southern District of San Diego in this matter on June 2, 2004. The Complaint named six causes of action against all the Defendants: (1) violation of freedom of speech under the First Amendment to the United States Constitution; (2) violation of the Free Exercise Clause of the First Amendment to the United States Constitution; (3) Violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution; (4) Violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution; (5) violation of the Establishment Clause of the Fourteenth Amendment to the United States Constitution; and (6) violation of civil rights guaranteed by California Civil Code section 52.1. The Complaint prayed for injunctive and declaratory relief, compensatory and punitive damages, and costs.

On June 22, 2004, Respondents moved to dismiss the Complaint, or in the alternative to strike the prayer for money damages, under Federal Rules of Civil Procedure 12(b)(6), 12(f), and 12(b)(1). On July 12, 2004, while the motion to dismiss was pending, Chase filed a motion for preliminary injunction, seeking to enjoin the School from preventing him from wearing his T-Shirt on campus.

The District Court granted the motion to dismiss in part [dismissing Harper's Third Cause of Action (violation of Equal Protection clause) without prejudice, dismissing Harper's Fourth Cause of Action (violation of Due Process clause) with prejudice, and dismissing Harper's Sixth Cause of Action (violation of Cal. Civ. Code, § 52.1) as it related to Harper's

Third and Fourth Causes of Action]. The District Court also dismissed Harper's damages claims in full, based upon Eleventh Amendment immunity as to the School and individuals in their official capacity, and based upon qualified immunity as to the individuals in their individual capacities. The court denied the Respondents' motion with respect to Chase's First Amendment and Establishment Clause claims, as well as the state claim as it related to these non-dismissed claims.

The District Court also denied Chase's motion for preliminary injunction, on the basis that there was evidence showing that School administrators could reasonably forecast substantial disruption with school activities. Chase then filed an interlocutory appeal from the District Court's order denying the preliminary injunction and partially granting the motion to dismiss.

2. Chase and Kelsie file an amended complaint seeking identical relief.

While the appeal was pending, Chase and Kelsie filed the operating Second Amended Verified Complaint (Pet. App. 143a), alleging the same five Constitutional claims, and adding two novel state claims under California law.

Within the operating complaint, Kelsie alleges claims identical to Chase, and seeks injunctive relief, as well as money damages injunctive and declaratory relief. Pet. App. 170a. Kelsie and Chase allege that they are prohibited from "engaging in the same or similar conduct" that Chase engaged in when he wore his T-shirt in 2004. Pet. App. 144a. Kelsie further alleges that she "desires to express an identical message through speech and/or clothing regarding her religious viewpoint of homosexuality to Poway High School." Pet. App. 159a. Chase and Kelsie both allege that they "would be forced to cover up or remove any clothing expressing this message." Pet. App. 159a.

3. The Ninth Circuit affirms the District Court's denial of the motion for preliminary injunction, and denies the request for *en banc* review.

A three-judge panel of the Ninth Circuit, in a 2-1 decision, affirmed the District Court's order denying the preliminary injunction. Pet. App. 1a. The majority opinion held that the School and employees did not violate Chase's First Amendment rights. Pet. App. 45a. The majority opinion did not address Chase's claim that the District's policies were unconstitutional, and deferred ruling on whether the motion to dismiss was properly granted. Pet. App. 44a-45a.

—On May 31, 2006, the Ninth Circuit panel amended its previously published decision. Pet. App. 81a. Before the amendment was published, Chase petitioned the Ninth Circuit for rehearing *en banc*. The Ninth Circuit denied the petition on July 31, 2006. Pet. App. 136a.

IV. REASONS FOR DENYING THE PETITION

A. The Petition is Premature Given the Procedural Posture of the Case.

Due to the fact that there has been an interlocutory appeal, this case has taken two separate tracks: an appellate track and a litigation track. While this particular portion of the case has wound its way up the appellate ladder, the remainder of the case continues to be litigated in the District Court. In fact, the District Court heard the parties' cross motions for summary judgment on May 26, 2006, but has not yet issued a decision. Those cross-motions, and a potential trial, will decide the remainder of the case, including those legal issues that the Ninth Circuit's majority opinion did not address, like the constitutionality of various District policies.

Because many of the factual and legal issues have not been resolved in the litigation portion of the case, the Petition should

be denied. While the Petition is not technically premature, justice would be better served if this Court were able to consider the entire judgment rather than a small portion of the case. If this Petition is denied, the parties will still have the opportunity to file a second petition after all of the issues of fact have been resolved, and after the District Court and Ninth Circuit have addressed all of the legal issues.

Also affecting the litigation in this case is the fact that this Court granted certiorari on December 1, 2006 in the case of *Morse v. Frederick*, Docket Number 06-278. In *Morse*, a high-school student unfurled a banner reading "Bong Hits 4 Jesus" at an off-campus event. *Frederick v. Morse*, 439 F.3d 1114, 1115 (9th Cir. 2006). The principal confiscated the banner because it was inconsistent with the school's anti-drug mission, and suspended the student. *Id.* at 1116. The student claimed his free-speech rights were violated, and the Ninth Circuit agreed. *Id.* at 1123.

The forthcoming opinion in the *Morse* case, as to whether the censorship of the student was permissible, will contain law concerning the First Amendment rights of students that will affect the litigation of this case as it continues in the District Court and in any additional appeals. The parties will have to re-analyze this case in light of the principles this Court sets down in deciding *Morse*.

In short, there is a long way to go in determining Chase and Kelsie's claims. The most expedient path would be for this Court to deny the instant Petition, and permit the case to resolve in the District Court and Ninth Circuit, before deciding on a future Petition whether the case merits a grant of certiorari.

B. There Is No Inconsistency Between the Ninth Circuit's Holding and Supreme Court Precedent, Which Explains That Students May Hold and Express Their Opinions, But Must Do So in a Civil Manner.

The Ninth Circuit's ruling embraces the jurisprudence of this Court with respect to student speech as explained in *Tinker v. Des Moines School Dist.*, 393 U.S. 503, 21 L. Ed. 2d 731, 89 S. Ct. 733 (1968) ("*Tinker*") and *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 92 L. Ed. 2d 549, 106 S. Ct. 562 (1988) ("*Fraser*").

1. *Tinker* stands for the proposition that political speech at school which disrupts the learning environment and invades the rights of students to be secure and let alone may be limited by school authorities.

In *Tinker*, some students wore black armbands to show their opposition to the United States's activities in Vietnam. The school suppressed this speech by enacting a policy banning the armbands, and suspending the students for violating it. The students sued for violation of their First Amendment rights to free speech. The *Tinker* court ruled that a school's suppression of political student speech violates the First Amendment unless the speech "materially disrupts classwork or involves substantial disorder *or invasion of the rights of others*." *Tinker*, 393 U.S. at 513, emphasis added.

In applying the facts, the *Tinker* court held that the school violated the students' First Amendment right to engage in a *nondisruptive, passive*[1] expression of a political viewpoint.

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1. Chase's T-shirt was anything but passive and nondisruptive. First, it was not passive or symbolic. It's words actively attacked a core characteristic of non-heterosexual students and staff. Second, it was

(Cont'd)

Id. at 508. But the *Tinker* court was careful to note that the case did "not concern speech or action that intrudes upon the work of the schools or *the rights of other students*." *Id.*, emphasis added.

This case, on the other hand, directly concerns the rights of other students. To that end, the Ninth Circuit Panel specifically quotes *Tinker* for the proposition that students have the constitutional right "to be secure and let alone" and that schools may curtail speech that would "impinge upon rights of other students." Pet. App. 17a (quoting *Tinker*, 393 U.S. at 308-309). There is nothing in *Tinker* to suggest that the right to be left alone does not include the right to be free from discrimination and harassment based upon a protected classification.

This case is also distinguishable on its facts because the school in *Tinker*, rather than prohibiting a broad range of controversial speech, solely banned a symbol worn to express opposition to American involvement in Vietnam. The *Tinker* Court explained that this was not allowed: "The prohibition of expression of one particular opinion, *at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline*, is not constitutionally permissible." *Id.* at 511, emphasis added. The flip side of this rule, as the Ninth Circuit points out, is that when one particular opinion disrupts the classroom or interfere with schoolwork or discipline or the rights of others, then it may be silenced

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(Cont'd)

disruptive: The administrators and one of Chase's teachers described how the previous year's "Day of Silence" had resulted in "volatile behavior" and "tensions between students," including physical altercations. The teacher observed disruption in the class that Chase attended while wearing the T-shirt, and the principal described how Chase told him that a "tense verbal conversation with a group of students" had already taken place due to the T-shirt's message.

regardless of what the viewpoint may be. Pet. App. 30a. And as explained in the next section, the curtailing speech by school officials because of tone, rather than mere content, is permissible under Supreme Court precedent.

2. *Fraser* adds to *Tinker* by holding that speech which offends the sensibilities of other students, even where providing a political opinion, may be quieted by school administrators.

Under *Fraser* and *Tinker*, quieting speech because of its uncivil tone is permitted. *Fraser* complements *Tinker* by emphasizing that regardless of a student's viewpoint, they must express it in a civil manner:

> The undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior. Even the most heated political discourse in a democratic society requires consideration for the personal sensibilities of the other participants and audiences.

Fraser, 478 U.S. at 681.

The *Fraser* court even used the example of the United States Congress as one where "some of the most vigorous political debates in our society are carried on" in an atmosphere where "impertinent," "offensive," "abusive" and "indecent" language is prohibited. *Id.* at 682. The *Fraser* court further explained that the "fundamental values of 'habits and manners of civility' essential to a democratic society must, of course, include tolerance of divergent political and religious views, even when the views expressed may be unpopular." *Id.* at 681. The court went on to say that "these 'fundamental values' must also take into account consideration of the sensibilities of others, and, in the case of a school, the sensibilities of fellow students." *Id.* at 681.

In short, *Fraser* explained that although students have the right to express an opinion or viewpoint, students must do so with a tone that does not offend the sensibilities of other students. *Id.* at 683. This is consistent with the goal of public education to teach students the values of civility and manners:

> 'Public education must prepare pupils for citizenship in the Republic. . . . It must inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation.' [Citation.] In *Ambach v. Norwick*, 441 U.S. 68, 76-77, 99 S.Ct. 1589, 1594, 60 L.Ed.2d 49 (1979), we echoed the essence of this statement of the objectives of public education as the 'inculcat[ion of] fundamental values necessary to the maintenance of a democratic political system.'

Fraser at 681.

3. The Ninth Circuit's Opinion Is Wholly Consistent With *Tinker* and *Fraser*.

The Ninth Circuit does not hold, as Petitioners suggest, that a school may ban one viewpoint in favor of another. The *Tinker* rule is viewpoint neutral—the Ninth Circuit held only that a viewpoint may be limited in "instances of derogatory and injurious remarks" directed at protected characteristics of others. Pet. App. 27a. Thus, the Ninth Circuit's holding permits students to engage in "controversial political speech, even when it is offensive to others," but not when the speech becomes a direct personal attack. Pet. App. 26a-27a. But the Ninth Circuit also warns that under *Tinker* and *Fraser*, "[l]imitations on student speech must be narrow, and applied with sensitivity and for reasons that are consistent with the fundamental First Amendment mandate." Pet. App. 26a.

The Ninth Circuit was correct to hold that the phrase "Homosexuality is Shameful" on Harper's T-shirt is a derogatory and injurious remark aimed at demeaning that minority group of students who are not heterosexual. Pet. App. 17a. The tone and manner of Chase's speech does not espouse a purely political viewpoint, but rather, personally attacks a group of students due to an inherent characteristic. This is the kind of speech that is permitted to be regulated under the "rights of others" prong of *Tinker*.

4. The "rights of others" includes not only the right to be left alone, but the right to be free from discrimination and harassment under the Fourteenth Amendment and state statutes.

Although students do not shed their speech rights at the schoolhouse door, they also do not shed their right to participate fully in the educational process, free from discrimination and harassment. Besides disrupting the classroom, Harper's shirt also invaded the rights of homosexual students to be free from discrimination and harassment under the federal and state law. "A school need not tolerate student speech that is inconsistent with its basic educational mission, [ ] even though the government could not censor similar speech outside the school." *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266, 108 S. Ct. 562, 98 L. Ed. 2d 592 (1988) (citation and internal quotation marks omitted).

One of the top priorities of school administrators is to prevent harassment based upon protected classifications. "Sexual orientation" is a classification of persons for purposes of the Fourteenth Amendment. Consequently, the Fourteenth Amendment protects students who are subject to student-on-student sexual orientation harassment by permitting them to privately sue school officials who are deliberately indifferent to their complaints. *Flores v. Morgan Hill Unified Sch. Dist.*, 324 F.3d 1130 (9th Cir. 2003).

School officials in California have obligations under state law as well as federal law. California law requires not only the prohibition of harassment, but also that schools be *proactive* in promoting tolerance of others' protected classifications. Cal. Educ. Code, § 201, subd. (e). "California's public schools have an affirmative obligation to combat racism, sexism, and other forms of bias." Cal. Educ. Code, § 201, subd. (b). And California Education Code section 220, combined with California Penal Code section 422.6, forbids schools from discrimination on the basis of sexual orientation, or perceived sexual orientation. Discrimination, by its nature, includes discriminatory intimidation or harassment. *Gebser v. Lago Vista Ind. Sch. Dist.*, 524 U.S. 274, 281, 141 L. Ed. 2d 277,118 S. Ct. 1989 (1998). Petitioners do not challenge the constitutionality of the California anti-harassment statutes in the California Education Code. Thus, School administrators have a duty to keep the campus free from discrimination and harassment on the basis of sexual orientation.

In light of this federal and state anti-discrimination law, the Ninth Circuit's decision in this case does not conflict with either *Tinker* or *Fraser*. On the contrary, the Ninth Circuit's opinion is entirely consistent with both cases, which attempt to balance a student's right to speak an opinion with the sensibilities of the other students. The "sensibilities" discussed by *Fraser* are now statutory anti-discrimination law in California—enacted after *Tinker* and *Fraser* were decided—that Respondents *must* follow.

For school administrators, following the statutory anti-harassment mandates and balancing students' First Amendment rights is a "difficult situation," according to Judge Kozinski's dissenting opinion. Pet. App. 77a. Respondents have attempted to walk a very narrow line: permit Chase to speak his opinion without creating a hostile learning environment for other

students. Chase was neither suspended nor disciplined, and nothing went into his school record. Panel Op., p. 32. Assistant Principals Antrim and Giles expressed to Plaintiff that they understood his views and that he should try to express those views in a non-hostile, more positive manner. Pet. App. 348a, 360a. The Ninth Circuit recognized that the school administrators merely tried to teach Chase the virtues of tolerance, which it deemed a proper exercise of school function. Panel Op., pp. 47-48.

5. The Ninth Circuit's Opinion is also consistent with precedent concerning verbal harassment in the workplace.

This Court has stated that it is incumbent upon the schools to teach students about real-world civil values:

> The determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board.
>
> . . .
>
> The process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the civics class; schools must teach by example the shared values of a civilized social order. Consciously or otherwise, teachers-and indeed the older students-demonstrate the appropriate form of civil discourse and political expression by their conduct and deportment in and out of class. Inescapably, like parents, they are role models.

Fraser, 478 U.S. at 683.

School administrators and teachers are therefore tasked with teaching tolerance. In part, they are preparing students for future

employment, where discrimination and harassment are not tolerated.[2] For example, an employee may only freely exercise his or her First Amendment rights as long as such exercise does not infringe on the rights of others by manifesting discrimination prohibited by the employer's harassment policy. *Bodett v. CoxCom, Inc.*, 366 F.3d 736, 741-742 (9th Cir. 2004), citing *Peterson v. Hewlett-Packard Co.*, 358 F.3d 599, 603-605 (9th Cir. 2004). Why should students be permitted more leeway to utter harassing and discriminatory statements than employees? Under the Ninth Circuit's decision, students would not. Therefore, the Petition should be denied.

C. The Ninth Circuit's Opinion Does not Conflict With Any Other Circuits.

Until now, no federal case has analyzed and decided a case posing an "as applied" challenge of First Amendment rights in schools under the "rights of others" *Tinker* prong. Respondents have attempted to locate, but cannot find, any other published post-*Tinker* case to analyze and apply *Tinker*'s "rights-of-others"

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2. See *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 389 (1992) ("[S]exually derogatory 'fighting words,' among other words, may produce a violation of Title VII's general prohibition against sexual discrimination in employment practices ...."") (citations omitted); *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 73 (1986) (stating that severe and persistent verbal sexual harassment can constitute violation of Title VII); *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1524-27 (M.D. Fla. 1991) (holding that the First Amendment does not bar injunction against continued verbal harassment and display of sexually explicit photographs found to contribute to sexual harassment in violation of Title VII of the Civil Rights Act of 1964); *Aguilar v. Avis Rent A Car Sys., Inc.*, 980 P.2d 846, 858 (Cal. 1999) (holding that the First Amendment does not bar injunction against continued use of racial epithets in the workplace found to contribute to a hostile environment in violation of state anti-discrimination law).

prong. This is a case of first impression. Consequently, this case does not conflict with any other Circuit's decision.

In addition, the Ninth Circuit's rule is viewpoint neutral. It permits a school to regulate speech, regardless of content, if the speech crosses the line into a personal attack on the personal protected characteristics of students that may be injurious. There is nothing in the Ninth Circuit's opinion that would permit gay students to insult and demean Christian students, just as the opinion limits the insults that Christian students may hurl at gay students.

1. There is no conflict with the Third Circuit.

Petitioners contend that the Ninth Circuit's opinion in this case conflicts with *Saxe v. State College Area School Dist.*, 240 F.3d 200 (3rd Cir. 2001). The Saxe case is distinguishable in part because it involved a facial constitutional challenge to a school district anti-discrimination policy rather than applied challenge to specific student speech regulated by the school. *Id.* at 214. The Third Circuit ruled that the school's policy was unconstitutionally overbroad. *Id.* at 217.

But in its analysis, the Third Circuit did not rule out that *Tinker* may permit restrictions on student speech that creates a hostile learning environment if the speech is severe or pervasive. *Id.* The *Saxe* court agreed that the school district in that case "could argue that speech creating a 'hostile environment' may be banned because it 'intrudes upon . . . the rights of other students." *Id.* at 217. Ultimately, that particular issue was not before the court, and the court did not rule on the argument, but the passage in the case indicates that future cases could be decided under the "rights of others" prong of *Tinker*. Consequently, the Third Circuit's analysis in *Saxe* is not in conflict with the Ninth Circuit's holding in this case.

Petitioners also cite the case of *Sypniewski v. Warren Hills Regional Bd. of Educ.*, 307 F.3d 243 (3rd Cir. 2002). That case mentioned in a footnote that where a school regulates student speech "on no legitimate basis at all, it might be possible to conclude the subcategory of disruptive speech had been singled out simply because the school officials disfavored the views expressed." *Id.* at 268, n. 27. The Ninth Circuit's decision is consistent with this statement. The Ninth Circuit warned against regulating speech simply because the speech may offend, and instead premised its holding on the legitimate concern that some student speech may violate the rights of others. Pet. App. 26a-27a.

In short, the Third Circuit has acknowledged that schools have a compelling interest to suppress speech that may be deemed harassment of others, and under the proper circumstances, may limit student speech that invades the rights of others. The Ninth Circuit's holding in this case is not at odds with prior Third Circuit rulings.

2. There is no conflict with the Sixth Circuit.

Petitioners also argue that the Ninth Circuit's holding is in conflict with *Castorina ex rel. Rewt v. Madison County School Bd.*, 246 F.3d 536 (6th Cir. 2001) ("*Castorina*"). In *Castorina*, two students were suspended for wearing shirts displaying Confederate flags. The court reversed and remanded the case in order for the district court to gather additional facts concerning the manner in which the regulation of the speech was handled by school authorities and whether there was a history of racial violence at the school. *Id.* at 538.

The *Castorina* court did not apply the "rights of others" prong from *Tinker*, relying instead on the "disruption" and "disorder" prongs in reversing and remanding the case. The court suggested in dicta that it would be impermissible for the school to permit black students to wear speech that could be construed

as anti-white, whereas the Confederate flag was banned. *Id.* at 541-542. The Sixth Circuit suggested that if the flag is banned, both should be banned. *Id.* at 541.

The Ninth Circuit's ruling, however, does not run contrary to that dicta. The Ninth Circuit said that viewpoint regulation is permissible under *Tinker*, but implied that it must go both ways, where the schools may stop "instances of derogatory and injurious remarks directed at students' minority status such as race, religion, and sexual orientation." Pet. App. 27a, 81a. In other words, schools must fairly prevent two differing groups from harassing each other without a preference of one group over the other.

In this case, there is no evidence that gay Poway High students and their supporters demeaned the beliefs or practices of straight students or raised tensions on campus. Rather, the "Day of Silence," sponsored by a student club, was meant to bring to light the notion of tolerance for all students. Nor is there anything in the record to suggest that Respondents intended to, or actually did, limit Chase's viewpoint. Principal Fisher, as well as Assistant Principals Antrim and Giles, told Chase that he could voice his opinion on the issue of homosexuality, and Chase was encouraged instead to explain his viewpoint in a way that did not demean others. Consequently, there is no conflict between this case and the Sixth Circuit rulings.

3. There is no conflict with the Second Circuit.

Petitioners additionally contend that the Ninth Circuit's opinion here conflicts with the Second Circuit's opinion in *Guiles ex rel. Guiles v. Marineau*, 461 F.3d 320 (2nd Cir. 2006) ("*Guiles*"). In *Guiles*, a student wore a T-shirt that was critical of President George W. Bush, including his alleged illegal drug use. The school told the student that he could wear the shirt only if he taped over portions that offended the school dress code with respect to images of drugs and alcohol. The Second

Circuit held that the school violated the First Amendment rights of the student. *Id.* at 331.

The *Guiles* case did not involve speech which was demeaning to a personal characteristic of a student. Rather, it had to do with speech that contained an attack on a political figure and also contained drug references. The Ninth Circuit's opinion in this case dealt with both issues.

With respect to the political speech, the Ninth Circuit in this case explicitly noted that "T-shirts that denigrate the President, his administration, or his policies, or otherwise invite political disagreement or debate, including debates over the war in Iraq, would not fall within the "rights of others" *Tinker* prong. Pet. App. 25a-26a. With respect to the drug references, the Ninth Circuit noted that the *Frederick v. Morse* case, *infra*, which involved drug references, was distinguishable because the "substantial disruption" prong of *Tinker* was not met. This was because "school officials conceded that they punished the student's display of the banner *not* out of 'concern that it would cause disruption' but because 'the speech promotes a social message contrary to the one favored by the school.'" Pet. App. 29a.

In fact, like the *Morse* case, the Second Circuit never addressed the "rights of others" prong of *Tinker*. Instead, with respect to *Tinker*, the Second Circuit focused on school disruption, stating that "*Tinker* established a protective standard for student speech under which it cannot be suppressed based on its content, but only because it is substantially disruptive." *Id.* at 326. This statement, relied upon by Petitioners, does not contain any analysis of the "rights of others" prong or whether a particular viewpoint under that prong may be stifled by school authorities due to its content. Consequently, the Ninth Circuit's ruling in this case does not conflict with *Guiles*.

D. Respondents Do Not Oppose Kelsie's Inclusion As A Petitioner.

Kelsie Harper filed a motion to intervene as a petitioner in this case. Respondents do not believe such a motion was necessary, because it appears that the Rules of the Supreme Court, Rule 12.4, permits Kelsie to join the petition without permission by the Court: "Parties interested jointly, severally, or otherwise in a judgment may petition separately for a writ of certiorari; or any two or more may join in the petition." Kelsie is a party with an interest in the judgment, and may join the petition under the Rule.

Regardless of the procedure used, Respondents do not oppose Kelsie's motion to intervene or her inclusion as a Petitioner.

E. Vacatur is Unnecessary.

With Kelsie's inclusion as a Petitioner, vacatur is unnecessary because the standing requirements are met. But even if Kelsie is not included as a petitioner, the Ninth Circuit's decision should not be vacated.

Chase previously requested a vacatur in the Ninth Circuit due to his graduation from Poway High. The Ninth Circuit panel that heard the case also unanimously denied the request. Respondents' position is in accord with the Ninth Circuit's standing analysis, which stated:

> ". . . among other reasons, co-plaintiff [Kelsie] seeks identical injunctive relief on identical grounds. Although it was unnecessary to resolve any question of the co-plaintiff's standing when deciding the merits of the appeal, [Citation], a review of the district court record, including the amended complaints, demonstrates that the co-plaintiff has

> standing to pursue the same claims for the same relief."

Pet. App. 134a. The Ninth Circuit panel also noted that Chase's damages claim remains alive. *Id.* Consequently, the Ninth Circuit's decision still is vital as to the Petitioners' litigation claims, and should not be vacated.

V. CONCLUSION

The Petition should be denied because the case will be better situated for Supreme Court review after the issues of fact are decided in the District Court, and all of the legal issues, including potential issues raised by the future decision in *Morse v. Frederick*, are decided by the Ninth Circuit. Additionally, the Petition should be denied because the Ninth Circuit's holding follows the precedent established by this Court in *Tinker and Fraser*. Moreover, the Ninth Circuit's ruling is viewpoint neutral, and does not conflict with the rulings in any other Circuit.

Respectfully submitted,

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No. 06-595

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IN THE

Supreme Court of the United States

TYLER CHASE HARPER, a minor, by and through his parents RON HARPER, *et ux.*, *et al.*,

Petitioners,

v.

POWAY UNIFIED SCHOOL DISTRICT, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUGGESTION OF MOOTNESS

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SUGGESTION OF MOOTNESS

Respondents suggest the Petition for Writ of Certiorari is moot because it concerns the appeal of an interlocutory order which has now merged with the final judgment recently entered by the District Court.

INTRODUCTION

Petitioners Tyler "Chase" Harper and Kelsie Harper have sought review of the Ninth Circuit's decision affirming the District Court's denial of the Harpers' motion for preliminary injunction against Respondent Poway Unified School District ("School") and individual Respondents. The Harpers invoked appellate jurisdiction under 28 U.S.C. § 1292(a)(1), which permits interlocutory appeals from district court orders granting or denying injunctions.

On February 7, 2007, however, the District Court entered final judgment in this case in favor of the Respondents.[1] The District Court dismissed Petitioner Tyler "Chase" Harper's equitable claims as moot due to the fact that Chase has graduated from high school and no longer has standing. The District Court dismissed Chase's damages claims on Eleventh Amendment and qualified immunity grounds. The District Court also granted summary judgment in the Respondents' favor and against Petitioner Kelsie Harper.

Because the final judgment has been entered in the District Court, the interlocutory order at issue before this Court on Petition for Certiorari has now merged with the final judgment, and is moot. Accordingly, the Court should deny the Harpers' petition.

THE DISTRICT COURT ENTERED FINAL JUDGMENT IN FAVOR OF THE RESPONDENTS

A. Procedural Background Leading Up To The Parties' Cross-Motions For Summary Judgment.

On June 2, 2004, Plaintiff and Petitioner Tyler "Chase Harper, a minor, by and through his parents, Ron and Cheryl

1. On the next day, February 8, 2007, the Harpers filed a notice of appeal.

Harper, filed a complaint seeking declaratory and injunctive relief, as well as nominal and punitive damages, based on allegations that Defendants and Respondents violated Chase's constitutional rights when he was detained at school for wearing a t-shirt bearing the words "Homosexuality is shameful. Romans 1:27" on the front and "Be ashamed Our school has embraced what God has condemned" on the back.

On November 4, 2004, the District Court granted in part and denied in part Respondents' motion to dismiss the complaint, dismissing some of Chase's claims, and denying Chase's motion for preliminary injunction. *See Harper v. Poway Unified School District*, 345 F. Supp. 2d 1096 (S.D. Cal. 2004). The only claim dismissed with prejudice was Chase's claim that the Respondents had denied him due process under the Fourteenth Amendment. Chase appealed the District Court's denial of plaintiff's motion for preliminary injunction to the Ninth Circuit Court of Appeals. The Ninth Circuit affirmed, and the Harpers then filed the instant Petition.

Meanwhile, in the District Court, an amended complaint was filed on November 17, 2004, adding Kelsie Harper, Tyler Chase Harper's sister, as a plaintiff and reasserting other claims previously dismissed. The District Court, on February 23, 2005, granted in part and denied in part Respondents' motion to dismiss plaintiff's amended complaint, dismissing, *inter alia*, Kelsie K. Harper as a plaintiff based on lack of standing. The District Court subsequently granted leave to file a second amended complaint, which was filed on November 4, 2005, asserting the same claims presented in the first amended complaint and again adding Kelsie K. Harper as a plaintiff.

Petitioners' second amended complaint alleged that Respondents violated Petitioners' rights: (1) to free speech under the First Amendment to the United States Constitution (first cause of action); (2) to free exercise of religion under the First Amendment (second cause of action); (3) under the Equal Protection Clause of the Fourteenth Amendment (third cause of action); (4) to due process of law under the Fourteenth

Amendment (fourth cause of action); (5) under the Establishment Clause of the First Amendment (fifth cause of action); (6) under California Civil Code § 52.1 (sixth cause of action); (7) to free speech under California Education Code § 48950 (seventh cause of action); and (8) to free expression under California Education Code § 48907 (eighth cause of action).

The parties filed cross-motions for summary judgment. While the motions were being briefed, the Ninth Circuit, on April 20, 2006, affirmed the District Court's order denying Petitioners' motion for preliminary injunction. *See Harper v. Poway Unified School District*, 445 F.3d 1166 (9th Cir. 2006). Oral argument on the cross-motions occurred on May 26, 2006, and the motions were taken under submission.

On July 20, 2006, Respondents requested of the District Court that the parties be given the opportunity to file additional briefing on the parties' cross -motions, suggesting that Chase Harper's claims may now be moot due to his recent graduation from Poway High School. The District Court, on July 25, 2006, granted the request, and the parties filed supplemental briefs on the mootness issue. In addition, Chase Harper moved the Court to reconsider its dismissal with prejudice of his Due Process claim.

B. The District Court's Decision on the Parties' Cross-Motions for Summary Judgment and Chase Harper's Motion for Reconsideration.

The District Court issued an opinion on January 24, 2007 dismissing Chase Harper as a plaintiff based upon mootness grounds, denying Kelsie Harper's motion for summary judgment, granting the Respondents' motion for summary judgment as to Kelsie Harper, and denying it as moot with respect to Chase Harper. The District Court also denied Chase Harper's motion for reconsideration of his Due Process claim, which was previously dismissed from the original complaint with prejudice. The decisions by the District Court effectively ended the litigation in the trial court, and the District Court entered judgment on February 7, 2007.

Specifically with respect to Chase Harper, the District Court accepted Chase's concession that his graduation from Poway High School mooted his claims for declaratory and injunctive relief, citing *Cole v. Oroville Union High School Dist.*, 228 F.3d 1092, 1098 (9th Cir. 2000). With respect to Chase's damages claims, the District Court reiterated its previous ruling that the damages claims against the School and individuals acting in their official capacity were barred by the Eleventh Amendment, and that the damages claims against the individuals acting in their individual capacity were barred by the doctrine of qualified immunity. *See Harper*, 345 F. Supp. 2d at 1115-1119.

The remainder of the District Court's order concerned Kelsie Harper's claims. The District Court first explained that the Ninth Circuit's ruling bound it with respect to some claims based upon the law of the case doctrine, citing *Jeffries v. Wood*, 114 F.3d 1484, 1489 (9th Cir. 1997)(en banc). The District Court then rejected Kelsie's facial challenges to the School's hate speech policies on both overbreadth and vagueness grounds. Then, turning to Kelsie's state law claims, the District Court found no evidence that the Respondents used threats or intimidation to deprive Kelsie of a constitutional right, and also found that Kelsie could not maintain a claim for unfair discipline by the school because she was not disciplined.

With respect to Kelsie's remaining federal claims, the District Court disposed of Kelsie's Free Exercise and Equal Protection claims by relying upon the "law of the case" doctrine. Finally, the District Court thoroughly analyzed Kelsie's Establishment Clause claim, and held that the School's practices were constitutional under all three prongs of the test stated in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

DISCUSSION

"It is the duty of counsel to bring to the federal tribunal's attention, '*without delay*,' facts that may raise a question of mootness." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 68 n.23 (1997), emphasis in original, citing *Board of License Comm'rs of Tiverton v. Pastore*, 469 U.S. 238, 240 (1985) (per curiam).

When an appeal is taken from an interlocutory order, and then the district court enters final judgment while the interlocutory appeal is pending, then generally the interlocutory order merges into final judgment, and the appeal becomes moot. *Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 314 (1998), citing *Smith v. Illinois Bell Telephone Co.*, 270 U.S. 587, 588-589 (1926). More specifically, this Court has dismissed interlocutory appeals from the denials of a motions for temporary injunctions where thereafter the district court has later entered judgment, thus mooting the appeal. *See Shaffer v. Carter*, 252 U.S. 37, 44 (1920); *Pacific Tel. Co. v. Kuykendall*, 265 U.S. 196, 205 (1924).

In this case, Petitioners are asking this Court to review the Ninth Circuit's affirmance of the District Court's denial of a motion for preliminary injunction. A preliminary injunction is a temporary measure intended to furnish provisional protection while awaiting a final ruling on the merits; the order granting or denying preliminary relief may be appealed to prevent irreparable consequence. *See Carson v. American Brands, Inc.*, 450 U.S. 79, 83-86 (1981).

Here, however, the District Court's denial of the Harpers' motion for preliminary injunction has been mooted by the fact that the District Court proceeded to completely adjudicate the Harpers' claims for injunctive and declaratory relief in favor of the School and individual Respondents. Consequently, the interlocutory order denying a preliminary injunction has now merged with the judgment. The merger has rendered moot the question of whether the temporary relief should have been granted in the first instance. Accordingly, the Petition, which asks this Court to consider that interlocutory ruling, should be dismissed as moot.

CONCLUSION

The Petitioner's interlocutory appeal is now moot because judgment has been entered in the District Court. The Court should deny the Petition for Writ of Certiorari.

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In The
Supreme Court of the United States

TYLER CHASE HARPER, KELSIE J. HARPER, ET AL.,

Petitioners,

v.

POWAY UNIFIED SCHOOL DISTRICT, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONERS' RESPONSE TO RESPONDENTS' SUGGESTION OF MOOTNESS

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INTRODUCTION

Kelsie Harper still faces daily violations of her First Amendment rights that warrant injunctive relief. Ms. Harper is currently a junior at the Poway Unified School District High School ("School"). Petition for Writ of Certiorari at 3.[1] Ms. Harper is being subjected to serious, irreparable harm to her First Amendment freedoms every day she is in school and restricted by the School's broad policy prohibiting all negative, derogatory, and demeaning speech. *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Relief is needed now because she will graduate in June of 2008 – effectively ending her one time opportunity for exercising her free speech rights while in high school. The District Court's denial of preliminary injunction, and the Ninth Circuit Court of Appeals' affirmance thereof, is still at issue.

Even if this case were mooted by the District Court's ruling on the merits, the "established practice" is to reverse or vacate the ruling, not deny the petition. *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950). Thus, if this Court determines the District Court's order dismissing the case moots this petition, the judgment of the court of appeals must be vacated, and the matter remanded with directions to vacate the district court's initial ruling on preliminary injunction.

I. This Appeal Is Not Moot Because Kelsie Harper Is Still a Student At Poway High School.

Kelsie will only be in high school once, and even though she is seeking damages, no amount of money can ever compensate her for the restriction of First Amendment rights she is now experiencing. This is exactly the situation the appeal of interlocutory orders is designed to

[1] Respondents have already conceded to Kelsie's intervention in the petition for writ of certiorari. Respondents' Brief in Opposition at 26.

remedy. 28 U.S.C. § 1292(a)(1) permits "litigants to effectually challenge interlocutory orders of serious, perhaps irreparable, consequence." *Carson v. American Brands, Inc.*, 450 U.S. 79, 84 (1981).

A. Petitioners have the right to seek review of the Ninth Circuit's opinion, which is now law of the case.

As it stands, the Ninth Circuit's 2-1 opinion affirming the denial of preliminary injunction serves as law of the case. 18B Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 4478.5 (2d ed. 2006) ("A fully considered appellate ruling on an issue of law made on a preliminary injunction appeal . . . [is] law of the case for further proceedings in the trial court on remand and in any subsequent appeal").

The District Court held that it was bound by the opinion that the Petitioners are asking this Court to review. Accordingly, its recent order awarding summary judgment to the School was largely dictated by the Ninth Circuit's ruling on preliminary injunction. Suggestion of Mootness at 4. The Ninth Circuit will also be bound by its previous rulings when it considers the district court's award of summary judgment to the School on appeal. *See* Wright & Miller at § 4478.5.

If this petition is mooted simply because the District Court entered a final order in the matter, Ms. Harper will effectively be deprived of the opportunity to take advantage of her right to ask this Court to hear the issue of preliminary injunction, and the appellate court ruling that is now governing the case. This is bootstrapping at its worst, and is clearly not the law, as demonstrated below.

B. This petition is not moot because an award of preliminary injunction will still affect the rights of the parties.

This petition regarding the denial of preliminary injunction is not moot because the Petitioner is still in a position to obtain some benefit if this Court reverses the lower courts' preliminary injunction rulings. Similarly, a preliminary injunction appeal was not moot, despite the district court's ruling on the merits while the appeal was pending in *Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308 (1998). There, the plaintiffs sought breach of contract damages, and a preliminary injunction prohibiting the defendant from transferring assets while the case was pending. *Id.* at 312. The district court granted the injunction and the Second Circuit affirmed to avoid the prospect of plaintiffs being unable to collect on any judgment they may have obtained. *Id.* at 312-13.

But while the ruling on preliminary injunction was pending on appeal, the matter proceeded below and the district court ordered summary judgment for the plaintiffs. *Id.* This Court then granted certiorari and, like the School in this case, the respondents argued that any claim regarding the issuance of the preliminary injunction was moot because it had merged with the district court's final order granting summary judgment to respondents. *Id.* at 313.

This Court recognized that "***[g]enerally***, an appeal from the grant of a preliminary injunction becomes moot when the trial court enters a permanent injunction, because the former merges into the latter." *Id.* at 314 (emphasis added). The rationale underlying this general rule is simple when the court enters a permanent injunction after ordering a preliminary one: "The final injunction establishes that the defendant should not have been engaging in the conduct that was enjoined. Hence, it is reasonable to regard the preliminary injunction as merging into the final one. . . ." *Id.* at 315.

But this Court then held in *Grupo* that there is an exception to the general rule when a ruling on preliminary injunction would still affect the rights of the parties. A unanimous Court determined the preliminary injunction was not moot because a bond was required, and if the preliminary injunction was wrongly issued, the petitioners would still have a right to recover on that bond. *Id.* at 315, 335 n.2 (Justices Ginsburg, Stevens, Souter, and Breyer, dissented, but joined in this portion of the majority opinion).

Likewise, if the Harpers' preliminary injunction was wrongly denied, Kelsie's constitutional rights can still be protected because she is still in school. A preliminary injunction will serve to protect her rights so the matter is not moot.

This conclusion is supported by *Grupo's* analysis of *University of Texas v. Camenisch*, 451 U.S. 390 (1981), where the district court entered a preliminary injunction requiring the university to provide an interpreter for a deaf student. The university appealed, but while the appeal was pending, the student graduated, thus mooting the need for preliminary relief. The preliminary injunction order would therefore merge into the district court's final order because the student had graduated. *Grupo*, 527 U.S. at 316-17. Since Kelsie Harper has ***not*** graduated, no merger occurs and the motion for preliminary injunction is still at issue.

So the primary case relied upon by Respondents in support of their Suggestion of Mootness actually demonstrates that Kelsie's petition for writ of certiorari is not moot. The other cases Respondents cite do not hold to the contrary, primarily because none of them address a deprivation of First Amendment rights that cannot be remedied by damages.

Smith v. Illinois Bell Telephone Co., 270 U.S. 587 (1926), considered an appeal from the lower court's entry of an "interlocutory" order enjoining a commission from prohibiting the phone company from charging higher

rates. The district court later entered a permanent injunction giving the phone company the same relief. Applying the general rule referenced above, this Court dismissed the appeal of the interlocutory order granting temporary relief, because the same relief was later permanently given to respondents. Unlike Kelsie's situation where a preliminary injunction will serve to protect her free speech rights because she is still in school and the illegal conduct is ongoing, there was no longer any need to rule on the interlocutory relief because the court had entered a permanent injunction granting all the relief requested.

Pacific Tel. Co. v. Kuykendall, 265 U.S. 196 (1924), also involved a commission's failure to allow a phone company to raise its rates. The phone company appealed the denial of a temporary injunction directly to this Court. *Id.* at 198. While the appeal was pending, the lower court dismissed the case and the phone company appealed that order to this Court as well. *Id.* There was no need for preliminary injunctive relief because any harm the phone company endured from an inability to raise rates could be remedied by money damages.

The same is true in *Shaffer v. Carter*, 252 U.S. 37 (1920), where a resident of Chicago sued state authorities in Oklahoma for taxing his business interests in that state. He sought a "temporary" injunction, which was denied, and then he appealed the denial. *Id.* at 43. Later, he appealed the lower court's final dismissal of his claim. *Id.* This Court also applied the general rule in that case and dismissed the appeal of the denial of the temporary injunction. Once again, any damages resulting to the petitioner from taxation of his property could simply be remedied through money.

Smith, Shaffer, and *Pacific Telephone* are not controlling here because those cases all involved harm that could be remedied by an eventual order requiring defendants to pay damages. That is not true of Kelsie Harper's conundrum. No amount of money, or even permanent injunctive relief, will ever be able to fully compensate her for the loss

of her free speech rights. The only possible way to preserve her constitutional rights is to grant her request for an injunction while she is still in school. This case is more akin to *Liner v. Jafco, Inc.*, 375 U.S. 301, 303-04 (1964), where an appeal of a state court ex parte injunction prohibiting labor picketing of a construction site was not moot, even though construction was completed. The union's desire to engage in similar speech against other construction sites in the future, *id.* at 307, n.5, supplied the irreparable harm that kept the issue of injunctive relief from becoming moot.

This Court should allow the petition for writ of certiorari to proceed under *Grupo* because a ruling on preliminary injunction will still affect the rights of the parties. Moreover, it is the only way Kelsie will be able to avoid the irreparable harm to free speech rights that is now occurring every school day.

II. If This Appeal Is Moot, the Lower Courts' Decisions Should Be Vacated.

Should this Court determine that Petitioners' request for preliminary injunction is moot, the proper ruling is to vacate the lower court opinions on the matter, not simply deny the writ of certiorari. Under 28 U.S.C. § 2106, this Court has the authority to vacate any judgment brought before it for review, and may remand the case and direct the entry of any judgment "as may be just under the circumstances."

When a civil case from a federal court has become moot while on its way to, or pending before, this Court, the "established practice" is to reverse or vacate the judgment and remand with a direction to dismiss. *Arizonans for Official English v. Arizona*, 520 U.S. 43, 71 (1997) (quoting *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950)). Indeed, this course of action "has been followed in countless cases in this Court." *Great Western Sugar Co. v. Nelson*, 442 U.S. 92, 92 (1979).

Vacatur "clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented through happenstance." *Munsingwear*, 340 U.S. at 40. Vacatur of the court of appeals' judgment is particularly appropriate in this case if this appeal is moot, because Kelsie Harper will be left with no way to appeal a court of appeals decision that is now law of the case. Accordingly, the judgment of the court of appeals should be vacated and the case remanded to that court with directions to order the vacation of the district court's judgment on the motion for preliminary injunction as moot. *See Anderson v. Green*, 513 U.S. 557, 560 (1995) (per curiam) (ordering that disposition of a moot case).

A. Vacatur is necessary whenever the appellant does not intentionally moot the case.

Determining whether vacatur is appropriate is an equitable question, and the primary factor is the fault of the parties in causing the appeal to become moot. *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 25-26 (1994). If the party seeking relief does not intentionally cause the mootness, vacatur is appropriate. "A party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance, ought not in fairness be forced to acquiesce in the judgment." *Id.* at 25.

Vacatur is appropriate here because the district court's ruling on the merits was the normal culmination of the litigation process; it was not a deliberate effort to escape the consequences of the decision below.

B. Vacatur is also necessary to prevent an unreviewable decision from acting as law of the case in future proceedings in this matter.

While the appeal of the preliminary injunction was pending, this case continued to move forward in the District Court, and is now on appeal before the Ninth Circuit Court of Appeals. This fact tilts the equities even further in favor of vacatur. As demonstrated by the District Court's order on summary judgment, the Ninth Circuit's affirmance of the denial of preliminary injunction is now law of the case and governs the proceedings at the district court and on appeal. *See Royal Ins. Co. of America v. Quinn-L Capital Corp.*, 3 F.3d 877, 881 (5th Cir. 1993) ("As to decisions of law, the interlocutory appeal will establish law of the case"); 18B Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 4478.5 (2d ed. 2006) ("A fully considered appellate ruling on an issue of law made on a preliminary injunction appeal . . . [is] law of the case for further proceedings in the trial court on remand and in any subsequent appeal"). Thus, the risk of harm from an unreviewable decision is compounded.

Vacatur is the only way to ensure that the rights of all parties are preserved and that no one will be prejudiced by a decision that could not be reviewed. *Munsingwear*, 340 U.S. at 40. It will remove the effect of the lower courts' rulings on the request for a preliminary injunction, and the case will still be litigated and ruled upon – this time with a complete record – on the parties' cross-motions for summary judgment. As such, the equities strongly favor vacating the lower courts' decisions.

This Court has, on at least two occasions, vacated the judgment of the Court of Appeals on a motion for preliminary injunction because the motion – but not the underlying case – had become moot. *See University of Texas v. Camenisch*, 451 U.S. at 394 (preliminary injunction moot because student graduated); *Honig v. Students of California School for the Blind*, 471 U.S. 148, 149-50 (1985) (preliminary injunction requiring testing was moot because testing was complete and "[n]o order of this Court could affect the parties' rights with respect to the injunction"). And this is commonly done in the courts of appeals. *See, e.g., NutraSweet Co. v. Vit-Mar Enterprises, Inc.*, 176 F.3d 151, 153 (3d Cir. 1999); *Knaust v. City of Kingston*, 157 F.3d 86, 89-90 (2d Cir. 1998); *Animal Legal Defense Fund v. Shalala*, 53 F.3d 363 (D.C. Cir. 1995); *Ethredge v. Hail*, 996 F.2d 1173 (11th Cir. 1993); *Fauconniere Mfg. Corp. v. Secretary of Defense*, 794 F.2d 350 (8th Cir. 1986). Accordingly, vacatur is also appropriate in this case.

CONCLUSION

Given Ms. Harper's continued status as a student at Poway High School, her request for a preliminary injunction is not moot even though summary judgment has been awarded against her. "A final order dismissing the action or purporting to settle the matter does not make the appeal from a preliminary order moot. In fact, if it is determined on appeal that interlocutory relief should be granted, this will render the dismissal order moot and compel the lower court to consider granting final relief." 5 Am. Jur. 2d *Appellate Review* § 656 (2006).

Even if this Court agrees with Respondents and determines the petition is moot, it should not be denied. This Court should grant the petition for purposes of vacating the judgment of the United States Court of

Appeals for the Ninth Circuit and remand the case to that court with directions to order the vacation of the judgment of the district court with respect to the motion for preliminary injunction.

Respectfully submitted this
20th day of February, 2007,

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TYLER CHASE HARPER, ET AL.,

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Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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ARGUMENT

Respondents concede a number of matters that weigh in favor of Petitioners. First, they do not oppose the intervention of Kelsie Harper in this petition, thus eliminating any mootness concerns. Respondents' Brief in Opposition at 26 ("Resp. Brf.") Second, although this Court's forthcoming opinion in *Morse v. Frederick* is not likely to resolve all of the issues in this case, *see* Section IV *infra*, Respondents concede that *Morse* "will affect the litigation of this case." *Id.* at 13. Therefore, if certiorari is not granted, this matter should be held pending resolution of *Morse*.

Finally, respondents concede that their policy and practice allow school officials at Poway High School ("School") to censor student speech that reflects a viewpoint which the school deems negative or offensive. The Ninth Circuit's refusal to preliminarily enjoin this policy and practice directly conflicts with decisions of the Third, Sixth, and Second Circuits and this Court. The School's attempt to minimize these conflicts ignores Petitioners' challenge to the policy on its face, and their request that enforcement be enjoined while this case is pending. Continued enforcement of these viewpoint discriminatory policies is violating the rights of Kelsie Harper and other students on a daily basis, warranting certiorari as soon as possible.

I. No Further Factual Development is Needed to Preliminarily Enjoin the School's Ban on Negative and Offensive Speech.

There is no need to further develop the material facts in this case. Preliminary injunction is warranted even

under the Respondents' version of the facts. They concede they have a policy and practice prohibiting negative views. Resp. Brf. at 17 ("a viewpoint may be limited in 'instances of derogatory and injurious remarks'"). *See also id.* at 8, 9 (students can only express positive views). Respondents also concede that Chase Harper's shirt was censored because it "could possibly be offensive to others." Resp. Brf. at 6.

Respondents' contention that certiorari should be delayed completely ignores the Harpers' request that the unconstitutional school policies be preliminarily enjoined, both as applied and facially. Appendix 65a n.12 ("App."). Ongoing irreparable harm to the free speech rights of students will continue if this Court should wait to take up this matter until after the cross motions for summary judgment have been ruled upon and then considered by the Court of Appeals. Chase Harper has already been the victim of delayed justice as he graduated while the case was pending before the Ninth Circuit. The only way to avoid this same misfortune for Kelsie is to preliminarily enjoin the policies while the case is pending.

There is no need for further factual development before this Court can preliminarily enjoin the School's unconstitutional ban on "negative" and "offensive" speech. This Court should grant certiorari now to address the ongoing irreparable harm to the free speech rights of Kelsie Harper and other students while this case is pending.

II. Respondents Fail in Their Attempt to Reconcile the Split in the Circuits the Decision Below Causes.

Respondents vainly attempt to minimize the split in the circuits caused by the Ninth Circuit's opinion by

unjustifiably narrowing the conflicting rulings of the Third, Sixth, and Second Circuits. Respondents also mischaracterize the relief sought by the Harpers in an attempt to narrow the Ninth Circuit's ruling in this case. They fail to mention the Harpers' facial challenge to the School's policies – undoubtedly attempting to downplay the obvious contradiction between this case and those in other circuits.

A. Third Circuit

Respondents gloss over the obvious conflict between the Ninth Circuit's ruling in this case and *Saxe v. State College Area School Dist.*, 240 F.3d 200 (3rd Cir. 2001), by pointing out that the Third Circuit did not consider an as-applied challenge in that case. This argument holds no water because the Harpers requested that enforcement of the impermissibly overbroad school policies be enjoined as to all students, not just as applied to them. App. 65a, n.12. Overbreadth is exactly the ground upon which the Third Circuit relied in striking down the school policy in *Saxe* that also banned offensive, derogatory, and negative speech. 240 F.3d at 217.

Respondents' argument also fails to consider that the ruling in *Saxe* was very broad precisely because it was a facial challenge based on overbreadth. This "strong medicine" is used when there is no way to construe a government restriction on speech to avoid constitutional problems. *R.A.V. v. St. Paul*, 505 U.S. 377, 411-412 (1992). The Third Circuit determined that there was no way to constitutionally construe or apply the policy in that case. Since the School's policies here are remarkably similar to those found unconstitutional on their face in *Saxe*, the

Ninth Circuit's refusal to enjoin the policies facially and as applied to the Harpers necessarily conflicts with the Third Circuit's determination that such policies can never be applied in a constitutional fashion.

Respondents' contention that *Saxe* did not consider whether the policy at issue infringed upon the rights of others is groundless. The Third Circuit specifically held that, while the precise scope of this language in *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503 (1969), is unclear, "it is certainly not enough that the speech is merely offensive to some listener." 240 F.3d at 217. In the same paragraph, the court determined that the school policy prohibiting "negative" and "derogatory" speech concerning sexual orientation was unconstitutional. It is difficult to imagine a clearer conflict between cases.

Finally, Respondents completely mischaracterize *Saxe* as "acknowledg[ing] that schools have a compelling interest to suppress speech that may be deemed harassment to others. . . . " Resp. Brf. at 23. In reality, the entire opinion in *Saxe* expressed concern that broad anti-harassment policies like the one in that case, and the policy in this case, may violate free speech rights. "Loosely worded anti-harassment laws may pose some of the same problems as the St. Paul hate speech ordinance: they may regulate deeply offensive and potentially disruptive categories of speech based, at least in part, on subject matter and viewpoint." 240 F.3d at 207 (referring to the unconstitutional ordinances in *R.A.V.*). This case is even easier than *Saxe* because viewpoint discrimination is blatant. Resp. Brf. at 15 ("when one particular opinion disrupts the classroom or interfere [sic] with schoolwork or discipline or the rights of others, then it may be silenced. . . .") *See also*

id. at 8, 9 (students may only express "positive" viewpoints).

B. Sixth Circuit

The Sixth Circuit's determination in *Castorina ex rel. Rewt v. Madison County Sch. Bd.*, 246 F.3d 536 (6th Cir. 2001), that viewpoint-based discrimination is illegal in public schools was not merely a passing reference to the issue. The court's analysis of this issue is four pages long and concludes that "even if there has been racial violence that necessitates a ban on racially divisive symbols, the school does not have the authority to enforce a viewpoint-specific ban on racially sensitive symbols and not others." 246 F.3d at 544.

The Ninth Circuit ruled completely to the contrary, stating: "[P]ublic schools may permit, and even encourage, discussions of tolerance, equality and democracy without being required to provide equal time for student or other speech espousing intolerance, bigotry or hatred." App. 32a. Of course, determining whether a particular view is intolerant, bigoted, or hateful is solely in the unfettered discretion of school officials and the Ninth Circuit.

Respondents argue that Chase Harper was told that "he could voice his opinion on the issue of homosexuality, and Chase was encouraged instead to explain his viewpoint in a way that did not demean others." Resp. Brf. at 24. There is no citation to the record for this fact because none exists. Chase and his parents were actually told that he could not express his view of homosexual behavior because it was "negative." App. 154a, 348a, & 358a. Respondents do not even attempt to explain how disagreement with homosexual behavior can be expressed in

a positive w[illegible] Notably, the School has censored students wearing T-shirts containing the words "straight pride." App. 179a, 184a. This message was censored even though it arguably is more "positive" than "Stop the Hate" (speech by participants in the Day of Silence which was permitted. App. 180a.)

Even if Chase was told he could express his view, and even if he could figure out a way to do it so that school officials would think it is "positive," it does not fix the School's overly broad policy and practice of censoring all negative views that may be considered demeaning or derogatory – even if they are not disruptive. This is exactly what the Sixth Circuit determined schools cannot do in *Castorina*.

C. Second Circuit

The School argues that there is no conflict with *Guiles v. Marineau*, 461 F.3d 320 (2d Cir. 2006), because that case only addressed the "substantial disruption" requirement of *Tinker*. Resp. Brf. at 25. Of course that is precisely the point – the Second Circuit, like most other courts, views *Tinker* as only allowing censorship of student speech if it is substantially disruptive. "Infringement upon the rights of others" is just part of the disruption analysis. *See* App. 20a, n.12 (where the Ninth Circuit recognizes its decision conflicts with the analysis in *Saxe* and accuses that court of "conflating" the "rights of others" analysis with "substantial disruption").

The Second Circuit did not limit its opinion to political speech, contrary to Respondents' assertions, but also addressed speech that may be considered "offensive and repugnant." *Id.* at 328. Even if it had, the policy and

practice in this case applies to political speech, and the Ninth Circuit recognized that Chase's speech was political. App. 14a ("Harper's speech embodies the very sort of political speech that would be afforded First Amendment protection outside the school setting").

III. Respondents Attempt to Resolve the Conflict with Precedent of this Court by Ignoring Much of It.

The School's attempt to square the Ninth Circuit opinion with this Court's precedent conspicuously fails to address the cases protecting offensive speech and prohibiting viewpoint discrimination. *See* Petition for Writ of Certiorari at 15-18, 25-27 for examples of these cases. Instead, the School wrongly claims Chase Harper's speech was disruptive by misconstruing *Tinker* (ignoring Harpers' facial claim yet again), and misinterprets *Bethel v. Fraser*, 478 U.S. 675 (1986), to justify censorship of student views with an "improper tone."

A. Chase Harper's T-shirt was Not disruptive.

It is telling that one of the facts the School uses to show Chase's speech was disruptive is "the previous year's 'Day of Silence' had resulted in 'volatile behavior' and 'tensions between students. . . .'" Resp. Brf. at 15, n. 1. Thus, the School censored one side of the debate (Chase's) because the other side's event was disruptive the previous year. This inverse "Heckler's Veto" defies logic.

The School then cites alleged "disruption in the class," *id.*, apparently referring to a teacher's testimony that, "[a]fter seeing the shirt, I quickly looked around to see if its message had caused a disruption. It had: I observed

several students off-task talking. . . ." App. 352a. An alleged "tense conversation" Chase had with another student is also cited.[1] These incidents do not rise to the level of substantial disruption, especially when one considers the facts of *Tinker*. *See* App. 50a-52a for Judge Kozinki's analysis of the weakness of this evidence of disruption. In *Tinker* this Court found no substantial disruption despite the fact that

> students made hostile remarks to the children wearing armbands[, 393 U.S. at 508, and] . . . their armbands caused comments, warnings by other students, the poking of fun at them, and a warning by an older football player that other, nonprotesting students had better let them alone. There is also evidence that a teacher of mathematics had his lesson period practically "wrecked" chiefly by disputes with Mary Beth Tinker, who wore her armband for her "demonstration."

Id. at 517 (Black, J., dissenting).

Chase's speech was not substantially disruptive.

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[1] Respondents misstate the record by claiming that previous Days of Silence were disruptive because of the speech of students opposed to it, citing pages App. 343a, 347a, and 352a. But neither these pages, nor any other facts in the record, indicate that the disruption was caused by the students opposed to the Day of Silence. The only thing that is clear is that the Day of Silence had been disruptive in the past. "This year, because of what occurred last year, there were clearer guidelines set by the administrators for the Day of Silence so as not to cause disruption in the educational environment." App. 247a. The Respondents have never cited any facts indicating opponents to the Day of Silence caused the disruption.

B. *Fraser* Does Not Apply Here, and Does Not Authorize Viewpoint Discrimination.

Respondents blatantly mischaracterize *Fraser* as broadly requiring students to express their views "with a tone that does not offend the sensibilities of other students." Resp. Brf. at 17. The word "tone" is not even in the *Fraser* opinion. More importantly, *Fraser* dealt with sexually explicit speech in a school assembly and the school had a right to disassociate itself from this vulgarity. *See Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988).[2] The School's policies in this case ban a wide range of "negative" and "demeaning" speech that is not sexually explicit and does not take place in school assemblies. Chase's speech was not sexually explicit by any stretch of the imagination, and did not take place in a school assembly.

Finally, unlike the School's censorship in this case, the *Fraser* restrictions "were unrelated to any political viewpoint." 478 U.S. at 685. The Ninth Circuit did not base its ruling on *Fraser* for good reason. It is not applicable here.

IV. This Court's Ruling in *Morse v. Frederick* is not Likely to Resolve this Case.

Poway High School is censoring the speech of the Harpers and other students because it disagrees with their message. This is exactly what the school did in *Frederick v. Morse*, 439 F.3d 1114 (9th Cir. 2006), when it punished a student for displaying an offensive sign that conflicted

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[2] *See also Castorina*, 246 F.3d at 541, *Saxe*, 240 F.3d at 214, and *Guiles*, 461 F.3d at 327-28, for examples of lower courts that read *Fraser* as being limited to lewd, vulgar, or profane language.

with the school's own views regarding drug use. The Ninth Circuit held in that case that the Constitution prohibits viewpoint-based censorship of student speech that is not school sponsored and this Court should affirm that holding. *Id.* at 1123.

The Ninth Circuit should have reached the same conclusion in this case. But instead it altered the student speech analysis by holding that "demeaning" and "derogatory" viewpoints infringe on the rights of others and can be banned – something no other federal court has ever done. No such holding was made by the Ninth Circuit in *Morse*.

This Court granted certiorari in *Morse* on December 1, 2006 on two questions – both of which hinge on the issue of whether the student's speech in that case took place at a school-sponsored, faculty-supervised event. In the case at hand, the School's ban on negative and offensive speech is not limited to school-sponsored speech, and neither side has ever argued that Chase Harpers' speech took place at some sort of school-sponsored event. In fact, the Respondents contend that the Day of Silence was not sponsored by the School. Resp. Brf. at 3. This Court's opinion in *Morse* is therefore likely to focus on the possible applicability of *Kuhlmeier* and *Fraser*, neither of which is applicable here.

CONCLUSION

The Court should grant certiorari outright because the Ninth Circuit's errors go beyond the issues in *Morse*. Alternatively, Respondents concede that *Morse* will affect the decision in this case so it should be held pending the decision in *Morse*.

Respectfully submitted,

January 11, 2007

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No. 06-595

In The

Supreme Court of the United States

TYLER CHASE HARPER, ET AL.,

Petitioners,

v.

POWAY UNIFIED SCHOOL DISTRICT, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF LIBERTY LEGAL INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Curiae Liberty Legal Institute ("Institute") is a non-profit law firm dedicated to the preservation of first amendment rights. The Institute has appeared before this Court and federal appellate and district courts numerous times in numerous cases. In its commitment to the protection of expressive freedom and the religious liberty of all faiths, the Institute represents individuals and institutions nationwide. As a result, the Institute has represented and currently represents students in numerous cases involving governmental actions by school districts. *Tinker*[2] is often the only protection for the Institute's clients, whether the student is simply expressing a different idea or the student is sharing his or her religious faith with friends.

The decision below does great damage to the interests of *Amicus* and to the clients it represents nationwide. The Ninth Circuit decision not only creates a conflict in the circuits, but turns *Tinker* on its head and eviscerates its protections by allowing the government to now ban student ideas or speech with which it disagrees.

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[1] The parties have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of this Court. Pursuant to this Court's Rule 37.6, none of the counsel for the parties authored this brief in whole or in part and no one other than *amicus* or its counsel contributed money or services to the preparation and submission of this brief.

[2] *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503 (1969).

SUMMARY OF ARGUMENT

The Ninth Circuit decision below strikes at the very heart of *Tinker*. It will create problems throughout lower courts nationwide in an area of law, heretofore, remarkably clear for decades, and will lead to great confusion. Under *Tinker*[3] and *Bethel Sch. Dist. v. Fraser*[4], a school district may only ban speech if that speech is causing a material or substantial disruption, it is lewd, obscene or vulgar, or the speech violates the rights of others by falling into one of the limited unprotected categories of speech listed in *R.A.V. v. St. Paul*, 505 U.S. 377, 383 (1992). Speech short of these limitations cannot be restricted, even if the school district does not like the message being expressed or even if a majority of students do not like the message.

Our free society is willing to tolerate speech, beliefs and ideas which are repugnant to many or even all others except the speaker. The reason is obvious: one day one of us may be that speaker and our opinion may be equally offensive to the vast majority of others. From the abolitionist living in Savannah, Georgia in 1855, to the civil rights leader in 1955 Mississippi, to the student in West Virginia in 1943 who refused to say the Pledge of Allegiance, there has been and will always be voices among us who are at odds with the official government message. It is incumbent upon this Court to act as the guardian against government oppression of ideas with which the government disagrees.

This case is not just important because there is an obvious circuit split or because a wrong must be righted.

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[3] *Id.*

[4] 478 U.S. 675 (1986).

This case is important because the Ninth Circuit, the designated guardian of the right to peacefully dissent, created new law eviscerating *Tinker* and justifying government censorship because it also disagreed with the ideas being expressed. The decision cracks a fundamental pillar of First Amendment law, in fact, of American jurisprudence. The government may not set up a debate, take sides, and then punish those who express an opposing message. *Certiorari* should be granted.

ARGUMENT AND AUTHORITIES

I. The Ninth Circuit misapplied the "interference with the rights of others" guideline from *Tinker*.

The case below strikes at the very core of *Tinker*, will create problems nationwide in an area of, heretofore, remarkable clarity, and will result in great confusion throughout all lower courts. There are clearly defined limitations within which the government may regulate the content of speech because of its effect on the hearer or observer. These limitations, identified in *R.A.V. v. St. Paul*, 505 U.S. 377, 383 (1992), include obscenity, defamation and "fighting words." *See Roth v. United States*, 354 U.S. 476 (1957) (obscenity); *Beauharnais v. Illinois*, 343 U.S. 250 (1952) (defamation); *Chaplinsky v. New Hampshire*, 314 U.S. 568, 572 (1942) ("fighting words"). These three cases have one thing in common. They were decided prior to *Tinker*.

It is impossible to conceive that *Tinker*, in articulating the "material and substantial disruption" standard, intended to swallow the protection the Court afforded

student speech by unconsciously inserting what amounts to a heckler's veto. In fact, the Ninth Circuit's decision below, which reinterprets "interference with the rights of others" to allow censorship of student speech which might connect to another person's identity, would directly gut *Tinker*. Does anyone truly believe that children in families with military servicemen in *Tinker* did not feel a connection and even personally attacked by the black arm bands worn against their parents and relatives? Of course. Yet, the speech was still protected, even though it offended. The rationale of the decision below would literally gut *Tinker* itself and overturn decades of precedent. *Tinker* never sanctioned punishing speech because it offended others.

The "material and substantial disruption" standard may be seen as a summation or articulation of long established free speech jurisprudence. Speech may not be regulated unless it is causing harms unrelated to the message itself. Therefore, through the prism of *Tinker* and free speech cases upholding state regulation just a short time prior to *Tinker*, *Bethel Sch. Dist. v. Fraser*, involving obscene references and disruption, may be seen as a mere affirmation of these pre-existing constitutional norms. The school must simply show up to court with objective evidence of a reasonable forecast of material and substantial disruption or obscenity, fighting words, defamatory words or speech that is, in the normal course of constitutional jurisprudence, deemed of lesser value because of its non-communicative harms.

There are two approaches to achieving tolerance. One is to allow all sides to speak, to teach everyone to respect different ideas, and to treat one another with grace, even if you strongly disagree with their ideas or worldview. A

second approach is to ban dissenting ideas so no one feels challenged or offended and thus tension is avoided. The latter approach is repugnant in American law. The latter approach strikes at the core of *Tinker*. The latter approach is the decision below. The government may not set up a debate, take sides, and then ban those with different beliefs from responding.

II. The government cannot take sides in a debate by censoring all speech with which it disagrees.

A central theme of all First Amendment jurisprudence is whether the government regulation under review is an attempt to suppress a message because of the message and who is the messenger. To expose unlawful content-based policies and practices, an inquiry must be made into the legitimacy of the government's justifications furthered by the speech regulations. Disagreement with the message is obviously content-based, as are regulations which have no non-communicative conduct purposes. The Court has stated that "[t]he principal inquiry in determining content neutrality, in speech cases generally . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys," and if so, strict scrutiny applies. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); *see also Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 295 (1984).

First Amendment law both before and since *United States v. O'Brien* 391 U.S. 367 (1968), contains at its core the elemental proposition that an intent to stifle a message

because of disagreement with it simply cannot be reconciled with the Constitution.[5] According to O'Brien, the

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[5] *See, e.g., Texas v. Johnson*, 491 U.S. 397, 413 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."); *United States v. Eichman*, 496 U.S. 310, 319 (1990) (same); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55-56 (1988) (refusing to allow a public figure to maintain a cause of action for intentional infliction of emotional distress arising from a vulgar satire); *Cornelius v. NAACP Legal Defense and Education Fund, Inc.*, 473 U.S. 788, 806 (1985) ("Control over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral."); *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984) ("[T]he First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others."); *Perry Educ. Assoc. v. Perry Local Educators' Ass'n et al.*, 460 U.S. 37, 46 (1983) ("the State may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view"); *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 72 (1983); *Carey v. Brown*, 447 U.S. 455, 462-63 (1980); *FCC v. Pacifica Found.*, 438 U.S. 726, 745-46 (1978); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 63-65, 67-68 (1976); *Buckley v. Valeo*, 424 U.S. 1, 16-17 (1976); *Grayned v. City of Rockford*, 48 U.S. 104, 115 (1972); *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972); *Bachellar v. Maryland*, 397 U.S. 564, 567 (1970); *Brown v. Louisiana*, 383 U.S. 131, 142-43 (1966); *Stromberg v. California*, 283 U.S. 359, 368-69 (1931); *Niemotko v. Maryland*, 340 U.S. 268 (1951) (City cannot deny Jehovah's Witnesses permit to use a city park for Bible talks when other religious and political groups had been allowed to use the park for similar purposes); *Fowler v. Rhode Island*, 345 U.S. 67 (1953) (same); *Student Coalition for Peace v. Lower Merior Sch. Dist.*, 776 F.2d 431, 437 (3rd Cir. 1985) ("Viewpoint discrimination...is impermissible regardless of the nature of the forum."); *Baugh v. Judicial Inquiry and Review Comm'n*, 907 F.2d 440, 443-44 (4th Cir. 1990) ("Viewpoint-neutrality is concerned with limitations of speech on the basis of the viewpoint expressed and 'the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.' ").

actions of Defendants must be "unrelated to the suppression of free expression." *O'Brien*, 391 U.S. at 377 (emphasis added).

A core principle of the First Amendment is that "government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972). The Court has reiterated this principle on so many occasions, often in lengthy and eloquent statements, that it requires no extended analysis.[6] Moreover, the First Amendment not only prohibits the government from favoring one viewpoint over another, but also prohibits the government from seeking to avoid public controversy by banning speech on an entire subject – *i.e.*, "religious"[7] – and prohibits the government from granting a monopoly to one side of an issue.[8] As the Court has stated: "To permit

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[6] *See, e.g., Hudgens v. N.L.R.B.*, 424 U.S. 507, 520 (1976); *NAACP v. Button*, 371 U.S. 415, 444-45 (1963); *Carey v. Brown*, 447 U.S. 455 (1980); *Thomas v. Collins*, 323 U.S. 516, 537 (1945); *Thornhill v. Alabama*, 310 U.S. 88, 104 (1940); *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 535-37 (1980).

[7] *Widmar v. Vincent*, 454 U.S. 263, 269-270 (1981) (*citing Carey*, 447 U.S. at 464-465) (absolutely forbids the government from engaging in viewpoint censorship); *Good News Club v. Milford Central School*, 533 U.S. 98 (2001); *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819 (1995); *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993).

[8] *See, e.g., Johnson*, 491 U.S. at 413; *United States v. Eichman*, 496 U.S. 310 (1990) (same); *Cornelius*, 473 U.S. at 806; *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. at 804 ("[T]he First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others."); *Bolger*, 463 U.S. at 72; *Carey*, 447 U.S. at 462-63; *Pacifica Found.*, 438 U.S. at 745-46; *American Mini Theatres, Inc.*, 427 U.S. at 63-65, 67-68; *Buckley*, 424 U.S. at 16-17; *Grayned v. City of Rockford*, 408 U.S. 104, 115 (1972); *Mosley*, 408 U.S. at 95; *Bachellar*, 397 U.S. at 567; *Brown*, 383 U.S. at 142-43; *Stromberg*, 283

(Continued on following page)

one side of a debatable public question to have a monopoly in expressing its views . . . is the antithesis of constitutional guarantees." *City of Madison v. Wisconsin Employment Relations Committee*, 429 U.S. 167, 175-76 (1976). Clear legal precedent holds that religious speech viewpoint discrimination is an impermissible violation of the Speech Clause of the First Amendment. *Rosenberger*, 515 U.S. at 828; *Good News Club*, 533 U.S. at 111-12; *Lamb's Chapel*, 508 U.S. 384 (1993); *The Bronx Household of Faith v. Board of Education*, 331 F.3d 342, 345-46 (2nd Cir. 2003); *DeBoer v. Village of Oak Park*, 267 F.3d 558, 561 (7th Cir. 2001); *Church on the Rock v. City of Albuquerque*, 84 F.3d 1273, 1281 (10th Cir. 1996).

In Poway Unified School District ("Poway"), the government allowed the debate. Then, it took sides. Then it banned anyone from responding. Worse than that, it punished a student for presenting an opposing belief. Nothing could be more repugnant under First Amendment jurisprudence. This is not to say Poway could not have positioned itself better for outsiders in banning Harper's speech. Poway could have banned all speech on the subject of homosexuality. While *amicus* believes such a position would still be in conflict with *Tinker* and bedrock constitutional jurisprudence, since speech is protected absent a material and substantial disruption, banning all speech on the subject would have at least had the imprimatur of fairness to the casual observer. One wonders if the school district or the Ninth Circuit gave any consideration to how some students and parents may have felt seeing tax

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U.S. at 368-69; *Niemotko v. Maryland*, 340 U.S. 268 (1951); and, *Fowler v. Rhode Island*, 345 U.S. 67 (1953).

dollars and precious education time being spent on promoting beliefs and conduct with which they fundamentally disagree. In any event, Poway chose to ban only one side of the debate. Such a decision is fundamentally at odds with longstanding constitutional jurisprudence, and certainly even the most casual observer would perceive the Orwellian quality of Poway's censorship.

III. For Poway to institute such a broad and sweeping prior restraint on speech, it must meet its governmental burden of proving the ban is the least restrictive means with an extensive legislative fact-finding record.

Poway bears a heavy burden to uphold its prior restraint scheme on speech it disapproves. The Court has stated that "[a]ny system of prior restraints comes to this Court bearing a heavy presumption against its constitutional validity." *Bantam Books Inc. v. Sullivan*, 372 U.S. 58, 70 (1963). Poway "thus carries a heavy burden of showing justification for the imposition of such a restraint." *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971) (emphasis added). The Court has noted that "[t]he thread running through all these cases is that prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). Thus, the Court observed, it is "clear that the barriers to prior restraint remain high unless we are to abandon what the Court has said for nearly a quarter of our national existence and implied throughout all of it." *Id.* at 561. The Supreme Court has tended to recognize only a narrow number of situations in which prior restraints might be permissible. *See Southeastern*

Promotions, Ltd. v. Conrad, 420 U.S. 546, 558-59 (1975) ("In order to be held lawful, [a prior restraint], first, must fit within one of the narrowly defined exceptions to the prohibition against prior restraints").

In order for Poway to justify its censorship, it cannot rely upon "undifferentiated fear or apprehension." *Tinker*, 393 U.S. at 508. Under *Tinker*, Poway needs hard objective evidence forecasting disruption because of non-disruptive student speech, especially speech of students such as the Harpers who are of or near the legal age to vote or put their life on the line on the battlefields of Iraq. The students of Poway deserve at least the same level of constitutional protection afforded commercial purveyors of pornography.

When regulating pornographic speech, the government must develop an extensive record to justify such sweeping prohibitions on speech. See *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 822 (2000) (holding that "[n]o support for the restriction . . . in the near barren legislative record relevant to this provision" is fatal to the Government's case), contrast *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 187 (1997) (reviewing "a record of tens of thousands of pages' of evidence" developed through "three years of pre-enactment hearings, . . . as well as additional expert submissions, sworn declarations and testimony, and industry documents" in support of complex must-carry provisions). Anecdotal evidence and conclusory statements will not suffice. *See Playboy*, 529 U.S. at 822 ("the Government must present more than anecdote and supposition"); *see Sable Comm. of California v. FCC*, 492 U.S. 115, 129-30 (1989) ("[A]side from conclusory statements during the debates by proponents of the bill . . . the congressional

record presented to us contains no evidence of *how* effective or ineffective the . . . regulations were or might prove to be." (footnote omitted)).

Thus, in this case, Poway may only present evidence it considered during its board meeting when it adopted the prior restraint speech policies to demonstrate how these incredibly broad policies are absolutely necessary to prevent an imminent material and substantial disruption. In addition, this evidence must be extremely extensive. Neither the court of appeals below, nor Poway, is able to point to any evidence considered at the time the school board adopted the policies at issue to support their sweeping prohibitions on speech. Therefore, Poway must be enjoined and the Ninth Circuit reversed.

CONCLUSION

The decision below eviscerates this Court's holding in *Tinker* and decades of case law, strikes against the most fundamental freedom of every citizen against government censorship, and is supported by no evidence. *Certiorari* should be granted.

Respectfully submitted,

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No. 06-595

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In The

Supreme Court of the United States

TYLER CHASE HARPER, *et al.*,
Petitioners,

v.

POWAY UNIFIED SCHOOL DISTRICT, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF AMICUS CURIAE OF THE NATIONAL LEGAL FOUNDATION,

in support of the *Petitioners*

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INTEREST OF AMICUS CURIAE[1]

The National Legal Foundation (NLF) is a 501c(3) non-profit corporation organized to defend, restore, and preserve constitutional liberties, family rights, and other inalienable freedoms. The NLF and its donors and supporters are vitally concerned with the outcome of this case because of its public interest litigation and educational activities relating to the right to religious expression.

SUMMARY OF THE ARGUMENT

Poway Unified School District's censoring of Chase Harper's speech constitutes a heckler's veto. Both the district court and the Ninth Circuit blessed the heckler's veto. Both relied upon this Court's decision in *Tinker v. Des Moines Independent School District*, 393 U.S. 503 (1969) in so doing. However, the district court misunderstood *Tinker's* "material disruption" standard and the Ninth Circuit misunderstood *Tinker* "right's of other" standard. This Court should grant *certiorari* to clarify that Tinker was intended to protect against heckler's vetoes, not to throw the door open to them.

ARGUMENT

One need look no further than this Court's first discussion of the heckler's veto doctrine to understand the error committed by the district court and the Ninth Circuit in the instant case. In *Brown v. Louisiana*, 383 U.S. 131, 133, n.1 (1966), this Court stated "[p]articipants in an orderly demonstration in a public place are not chargeable with the danger, unprovoked except by the fact of the constitutionally protected demonstration itself, that their critics might react

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[1] The parties have consented to the filing of this brief. Copies of the letter of consent accompany this brief. No counsel for any party has authored this brief in whole or in part. No person or entity has made any monetary contribution to the preparation or submission of this brief, other than the *Amicus Curiae*, its members, and its counsel.

with disorder or violence."

This Court knew that a heckler's veto could have crippled the Civil Rights movement in this country. In fact, in *Brown*, this Court took pains to mention that that case was "the fourth time in little more than four years that this Court has reviewed convictions by the Louisiana courts for alleged violations, in a civil rights context, of that State's breach of the peace statute." *Id.* at 133. If Louisiana was a little slow to get the message, this Court was more than willing to keep granting *certiorari*[2] until the message came through loud and clear: The First Amendment will not tolerate a heckler's veto.

This Court knew that the heckler's veto was one of the majority's weapons of choice against the rights of a minority. Now, the two lower courts in this case have taken that weapon and blessed its use by a minority against the majority. Such error cannot stand. Just as this Court recognized the importance of granting *certiorari* when a heckler's veto was being used against a minority, so it should recognize the importance of grant *certiorari* when a heckler's veto is being used against the majority.

After all, as this Court wrote in *Brown*:

> A State or its instrumentality may, of course, regulate the use of its libraries or other public facilities. But it must do so in a reasonable and nondiscriminatory manner, equally applicable to *all* and administered with equality to *all*. It may not do so as to some and not as to all. It may not provide certain facilities for whites and others for Negroes. And it may not invoke regulations as to use—whether they are *ad hoc* or general—as a pretext for pursuing those engaged in lawful, constitutionally

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[2] Brown came before this Court on *certiorari* as did two of the other three cases this Court referenced: *Taylor v. Louisiana*, 370 U.S. 154 (1962); and *Garner v. Louisiana*, 368 U.S. 157 (1961). Only *Cox v. Louisiana*, 379 U.S. 536 (1965) came on appeal. Furthermore, Garner v. Louisiana was actually three consolidated cases.

protected exercise of their fundamental rights.

Id. at 143 (emphasis added). *Mutatis mutandis*, this sentence might read "A State or its instrumentalities may, of course, regulate the use of its public schools. But it must do so in a reasonable and nondiscriminatory manner, equally applicable to *all* and administered with equality to *all*. It may not do so as to some and not as to all. It may not provide certain rights to those with a pro-homosexual message and other (lesser) rights for those with an anti-homosexual message. And it may not invoke regulations—whether they are dress codes, harassment policies or *ad hoc* Day of Silence decisions—as a pretext for pursuing those engaged in lawful, constitutionally protected exercise of their fundamental rights."

Neither the district court's "substantial disruption" rationale nor the Ninth Circuit's "rights of others" rationale can disguise Poway's hecklers' veto. Neither is faithful to this Court's jurisprudence. We examine at each in turn.[3]

I. THE DISTRICT COURT'S "SUBSTANTIAL DISRUPTION" RATIONALE IS A MASK FOR POWAY'S HECKLER'S VETO BECAUSE THERE SIMPLY WAS NO DISRUPTION ATTRIBUTABLE TO CHASE'S SPEECH.

The district court's faulty decision is surprisingly analogous to *Brown* and the three cases it references—*Cox v. Louisiana*, 379 U.S. 536 (1965); *Taylor v. Louisiana*, 370 U.S. 154 (1962); and *Garner v. Louisiana*, 368 U.S. 157 (1961). As the *Brown* Court wrote about the earlier three cases (and it was equally true of *Brown* itself, 383 U.S. at

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[3] This brief will examine both rationales for two reasons. First, if this Court grants *certiorari* in this case, it should not just reverse the Ninth Circuit's judgment. Rather, it should make clear on remand that the Ninth Circuit cannot affirm the trial court on its original grounds. Second, not all courts make a sharp distinction between these two prongs. Thus anything said about the errors of one court's reasoning will be helpful in seeing the flaws in the other court's reasoning.

139-40), "[i]n none was there evidence that the participants planned or intended disorder. In none were there circumstances which might have led to a breach of the peace chargeable to the protesting participants." 383 U.S. at 133. The key here, of course, is that any violence must be chargeable to the protestor. Here there is absolutely no evidence of any violence chargeable to Chase Harper.[4]

For example, in *Taylor*, 370 U.S. at 155-56—perhaps the most analogous of all the cases due to the large number of people who strongly opposed the protestors' message—

> [a]t the trial there was testimony that immediately upon petitioners' entry into the waiting room many of the people therein became restless and that some onlookers climbed onto seats to get a better view. Nevertheless, respondent admits these persons moved on when ordered to do so by the police. There was no evidence of violence. The record shows that the petitioners were quiet, orderly, and polite. The trial court said, however, that the mere presence of Negroes in a white waiting room was likely to give rise to a breach of the peace. It held the mere presence of the Negroes in the waiting room, as part of a preconceived plan, was sufficient evidence of guilt.

This Court, of course, rejected that argument.

Similarly, in *Garner v. Louisiana*, 368 U.S. at 174, this Court noted that in each of the three consolidated cases "[t]he undisputed evidence shows that the police who arrested the petitioners were left with nothing to support their actions except their own opinions that it was a breach of the peace for the petitioners to sit peacefully in a place where custom decreed they should not sit."

In the case at hand, there was nothing to show that

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[4] As will be demonstrated below, this is true even under the standards applicable in the school setting.

Chase Harper did anything to threaten violence. Rather he did exactly what the civil rights protestors did; he engaged in expressive activities pursuant to his First Amendment rights.

"But wait," one might answer, "he is in school and the standards are different." True, but this Court has already made the adjustment for the school setting: that's what *Tinker v. Des Moines Independent School District*, 393 U.S. 503 (1969), was all about. After all, *Tinker* was decided just three years after Brown and arose in the same cultural milieu of social protest. In *Tinker*, this Court cited *Terminiello v. Chicago*, 337 U.S. 1 (1949), arguably the *leading* heckler's veto case, and famously addressed the school's ability to anticipate violence:

> The District Court concluded that the action of the school authorities was reasonable because it was based upon their fear of a disturbance from the wearing of the armbands. But, in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk, and our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.
>
> In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a

> mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. Certainly where there is no finding and no showing that engaging in the forbidden conduct would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school," the prohibition cannot be sustained.

Tinker, 393 U.S. at 508-09. This is the extent of the adjustment necessary—and allowed—for the school setting. Anything more would gut—not modify—the application of the heckler's veto doctrine in the public schools.

Numerous courts have helpfully commented on the *Tinker* standard. One such case is *Butts v. Dallas Independent School District*, 436 F.2d 728 (5th Cir. 1971). There school officials forced students to remove black armbands that they wore in support of the Vietnam Moratorium. The court wrote

> [W]e do not agree that the precedential value of the *Tinker* decision is nullified whenever a school system is confronted with disruptive activities or the possibility of them. Rather we believe that the Supreme Court has declared a constitutional right which school authorities must nurture and protect, not extinguish, unless they find the circumstances allow them no practical alternative. As to the existence of such circumstances, they are the judges, and if within the range where reasonable minds may differ, their decisions will govern. But there must be some inquiry, and establishment of substantial fact, to buttress the determination.

Id. at 732.

Furthermore, the *Butts* court was emphatic that even an expected disruption is not the end of the analysis:

> We assume that the School Board was not necessarily required by the First Amendment to wait until disruption actually occurred. . . . [A]ntecedently considered, as they had a right and duty to consider the problem, disruption on [the protest day] was proved to be a likely contingency. We do not agree that this expectation sufficed *per se* to justify suspending the exercise of what we are taught by *Tinker* is a constitutional right. What more was required at least was a determination, based on fact, not intuition, that the expected disruption would probably result from the exercise of the constitutional right and that foregoing such exercise would tend to make the expected disruption substantially less probable or less severe.

Id. at 731.

Significantly, in that case, those opposed to the black armbands organized a counter protest by wearing white armbands. Just as in the present case, *Harper v. Poway Unified School District.*, 445 F.3d 1166, 1171-72, the school authorities in *Butts* decided to shut down one side of the debate and permit the other side to engage in its expressive activities.[5] *Butts*, 436 F.2d at 730-31. The Fifth Circuit upbraided the school district for doing exactly what Poway has done:

> [N]o use apparently was made of [the available] machinery to bring leaders of the white armband faction together with the black armbands to agree on mutual respect for each other's constitutional rights. If this had been tried and failed, the failure would have tended to establish that armbands of all colors should be banned. In short, it appears to us that the school system was confronted with a

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[5] While the school authorities intended to remove the white armbands as well, the court noted that the record indicates that did not happen. *Id.*

> rapidly developing crisis, for which it had no policy predetermined, and instead of obtaining an answer through democratic processes, it responded with a hasty ukase.

Butts, 436 F.2d at 732.

It is important to note the factual circumstances under which the Fifth Circuit made all of the above statements. As already noted, a counter protest was underway in the same school at the same time. *Id.* Black arm band wearers had also protested outside the school in the morning and one of their banners had been torn down by an opponent. *Id.* at 730. Furthermore, school officials feared that the white armband wearers would actually tear the black armbands off of the arms of their wearers. *Id.* at 731. Finally, school officials were worried about the agenda of the national organizers of the Moratorium, which was in part to disrupt schools. *Id.*

It was in this context that the Fifth Circuit made all of the statements quoted above. Furthermore, that court shut the door on the all-too-easy excuse that administrators on the ground should not be second guessed: "Therefore, even in the school environment, where no doubt restraints are necessary that the First Amendment would not tolerate on the street, something more is required to establish that they would cause 'disruption' than the *ex cathedra* pronouncement of the superintendent." *Id.* at 732.

The Fifth Circuit understood that even in situations much more volatile than that faced by Poway, a heckler's veto simply cannot be tolerated. That court provided additional insights in another case, *Shanley v. Northeast Independent School District*, 462 F.2d 960 (5th Cir. 1972). First, the court addressed the concern over "negative" expression:

> The school administration also expressed concern at what it believed to be the "negative" attitude of the newspaper and at the criticism, overt and covert, of the school administration.

> "Negativism" is, of course, entirely in the eye of the beholder, and presumably the school administration's eye became fixed upon the criticism by the students. As those to whom public and private criticism, of widely varying degrees of intention and rationality, has been directed, we can say with some pained assurance that "criticism" like "controversy" is not a bogey, at least not in a democracy. Of course, constructive criticism is far more helpful than any other sort of critique. But almost any effort to explain a different mode of operation or approach serves to illuminate the issue being questioned. If the criticism is irrational or ill-intentioned, then surely the American citizenry, even that of high school age, will have enough good sense to attach that much more credibility to the criticized actors and their actions. Without discussing any ramifications, since no discussion is compelled, suffice it to say that aversion to "criticism" is not a constitutionally reasonable justification for forbidding the exercise of First Amendment expression. The First Amendment's protection of speech and expression is part of the Bill of Rights precisely because those governed and regulated should have the right and even the responsibility of commenting upon the actions of their appointed or elected governors and regulators.

Id. at 973, n.10. Everything the *Shanley* court wrote about criticism of its school officials applies with equal force to Harper's criticism of his school's sponsorship of the Day of Silence. And by logical extension it applies to the activities of students who participated in what the school sponsored.

Shanley involved the suppression of an "underground" newspaper; therefore, its discussion of "prior restraint" is inapplicable here. However, its main teaching is germane:

> However, we must emphasize in the context of this case that even reasonably forecast disruption is not *per se justification* for prior restraint or subsequent punishment of expression afforded to students by the First Amendment . . . . "[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute . . . is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest. [citing cases]. There is no room under our Constitution for a more restrictive view." *Terminiello v. Chicago*, 337 U.S. at 4 . . . .

Id. (alteration in original).

The *Shanley* court had no hesitation adapting a strong version of the *Terminiello* standard to the school context. Of course, in so doing it was following this Court's lead from *Tinker*, 393 U.S. at 508. What this Court and the Fifth Circuit understood was that even in our public schools the heckler's veto must be minimized to the greatest extent possible.

And the Fifth Circuit has not been the only court to properly apply this Court's *Tinker* standard. In an in-school literature distribution case, the Seventh Circuit again thought it helpful to analogize from a non-school setting: "Consider a parallel: the police are supposed to preserve order, which unpopular speech may endanger. Does it follow that the

police may silence the rabble-rousing speaker? Not at all. The police must permit the speech and control the crowd; there is no heckler's veto." *Hedges v. Wauconda Community Unit Sch. Dist. No. 118*, 9 F.3d 1295, 1299 (7th Cir. 1993). In that case, an important issue was the need to distinguish between private student speech and the school's speech. In that context, the court's emphasis that educating listeners rather than squelching speakers applies with equal force here:

> School districts seeking an easy way out try to suppress private speech. Then they need not cope with the misconception that whatever speech the school permits, it espouses. Dealing with misunderstandings--here, educating the students in the meaning of the Constitution and the distinction between private speech and public endorsement--is, however, what schools are for. After hearing conflicting expert testimony the district court found: "*Issues and Answers* by itself does not appear school sponsored and . . . even junior high students probably would not think that it was school sponsored if it were passed out to them by a student standing alone on the school stairs before classes begin." Yet Wauconda proposes to throw up its hands, declaring that because misconceptions are possible it may silence its pupils, that the best defense against misunderstanding is censorship. What a lesson Wauconda proposes to teach its students! Far better to teach them about the first amendment, about the difference between private and public action, about why we tolerate divergent views. Public belief that the government is partial does not permit the government to *become* partial. Students therefore may hand out literature even if the recipients would misunderstand its provenance. The school's proper response is to educate the audience rather than squelch the speaker.

Id. at 1300 (citation omitted).

Similarly here, Poway has not tried to educate its students about divergent views. Rather it has become partial. It sponsors the Day of Silence and then shuts down opposing viewpoints.

Finally, an example of properly understanding the *Tinker* standard is offered by the district court in *Boyd County High School Gay Straight Alliance v. Board of Education*, 258 F. Supp. 2d 667, 689-90 (E.D. Ky. 2003). That case involved a school's attempt to disallow a Gay Straight Alliance Club to meet. There the court issued a preliminary injunction and therefore discussed the likelihood of success on the merits under the Equal Access Act, 20 U.S.C. § 4071 (2000). *Boyd County*, 258 F. Supp. 2d at 693. However, the court noted that the Equal Access Act had incorporated the *Tinker* standard and used that standard in its analysis. In so doing, it provided some useful guidance.

First, the *Boyd County* court set the stage by emphasizing that what this Court had done in *Tinker* was to reject the heckler's veto, by quoting (with added emphasis) this Court's instruction that it must be the conduct *of the protestors* that would cause the substantial disruption, and by noting this Court's use of *Terminiello*. *Id.* at 689. It then quoted the same language from *Terminiello* that the *Shanley* court used (see above), thereby also adapting a strong version of the *Terminiello* standard to the school setting. The *Boyd County* court quoted one additional line from *Terminiello*: "the alternative [i.e., permitting a heckler's veto] would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups." *Id.* at 690 (quoting *Terminiello*). Such a result would be especially incongruous in our public schools, which serve to teach our students how to participate in the market place of ideas.

The *Boyd County* court then put a fine point on it:

> Assuming *arguendo* that the anti-GSA faction at BCHS was sufficiently disruptive to 'materially and substantially interfere with the requirements of

> appropriate discipline,' Defendants are not permitted to restrict Plaintiffs' speech and association as a means of preventing disruptive responses to it. *Tinker*, 393 U.S. at 509. . . . *Tinker* and *Terminiello* are designed to prevent Defendants from punishing students who express unpopular views instead of punishing the students who react to those views in a disruptive manner.

Id. at 690.

Just as Boyd County High School could not squelch the speech of the pro-homosexual club, neither can Poway squelch Chase's speech on the other side of the issue.

Thus, we have seen that a number of courts have properly understood the application of *Tinker*. Unfortunately, a number of courts have lowered the threshold to the point of *permitting* a heckler's veto in the name of *Tinker*. Just one very recent example is provided by *Heinkel v. School Board*, 2006 U.S. App. LEXIS 21626 (Aug. 22, 2006), where the Eleventh Circuit upheld censorship with *no* evidence of disturbance indicated in the record.

In light of the strong version of *Terminiello* that *Tinker* (and *Butts*, *Shanley*, *Hedges*, and *Boyd County*) call for, the approach of *Heinkel* and other courts must be wrong. The district court below is also included in that number. Therefore, this Court should grant *certiorari* to give the needed guidance to those courts that have transmogrified *Tinker*'s "substantial disruption" prong from an eye of a needle through which few restrictions will pass into an open barn door through which virtually any restriction will pass.

II. THE NINTH CIRCUIT'S "RIGHT OF OTHERS" RATIONALE IS A MASK FOR POWAY'S HECKLER'S VETO BECAUSE THE NINTH CIRCUIT IGNORED THE ESTABLISHED MEANING OF THOSE RIGHTS.

This Court should grant *certiorari* for another reason.

Because no real threat of substantial disruption exists in this case, the Ninth Circuit did not hang its hat on that prong of *Tinker*. As the panel dissent explained, there is little to nothing in the record to show disruption of Poway's classrooms or non-classroom activities. *Harper*, 445 F.3d at 1193-94 (Kozinski, J., dissenting). As for the former, one teacher reported some students who were "off-task." *Id.* at 1171. This level of disruption cannot be grounds for squelching Chase's speech. After all in *Tinker* itself, one class was "wrecked," and students' minds were diverted from their lessons. *Tinker*, 393 U.S. at 517 (Black, J., dissenting). As for the latter, the record again is little different from the record in *Tinker* and less severe than the cases discussed above. In *Tinker* there were warnings between students, and students made fun of each other. Here, there were tense discussions and recollections of "an altercation" the previous year. As the dissent explained, students apparently learned to conduct themselves more peacefully during the second year since no altercations were reported. *Harper*, 445 F.3d at 1194 (Kozinski, J., dissenting). And, of course, critically, there was no indication in the record that the altercation had been the fault of the anti-Day of Silence students generally or of Chase Harper specifically.

Presumably, the panel majority knew that the panel dissent was correct in its demonstration that Chase's speech could not be squelched under *Tinker's* "material disruption" prong. Presumably, that is why the majority hung its hat on the "rights of others" prong. However, the majority achieved nothing more than cloaking a heckler's veto in another mantel. This is equally impermissible and constitutes another reason why this Court should grant *certiorari*. Heckler's vetoes must be unmasked, no matter what their disguise.

The panel majority several times invoked but—significantly—declined to rely upon California state law. *Id.* at 1176, 1179-81. Thus, the only rights the panel relied upon were the right to be secure and the right to be let alone. *Id.* at 1178. However, the panel inexplicably failed to note the

clarity with which this and other courts have defined those rights. Had the rights been properly explicated, the court would have reached the opposite conclusion. Because it did not, this Court should grant *certiorari* to re-emphasize that improper interpretations of the rights of others will not be allowed to turn *Tinker* into a license for heckler's vetoes.

A. The Ninth Circuit's "Right to be Let Alone" Rationale is a Mask for Poway's Heckler's Veto Because that Right Merely Protects Students from Importuning by Speakers—Something that did not Occur Here.

We look first at the right to be let alone. This Court delivered the classic articulation of the First Amendment aspect[6] of this right in *American Steel Foundries v. Tri-City Central Trades Council*, 257 U.S. 184, 204 (U.S. 1921), a labor picketing case, writing

> How far may men go in persuasion and communication and still not violate the right of those whom they would influence? In going to and from work, men have a right to as free a passage without obstruction as the streets afford, consistent with the right of others to enjoy the same privilege. We are a social people and the accosting by one of another in an inoffensive way and an offer by one to communicate and discuss information with a view to influencing the other's action are not regarded as aggression or a violation of that other's rights. If, however, the offer is declined, as it may rightfully be, then persistence, importunity, following and dogging become unjustifiable annoyance and

[6] It must be "the privacy interest in avoiding unwanted communication" *Hill v. Colorado*, 530 U.S. 703, 716 (2000), implicated here. Neither the Fourth or Fifth Amendments are at issue here and these are the other issues implicated by the right to be let alone.

> obstruction which is likely soon to savor of intimidation. From all of this the person sought to be influenced has a right to be free . . . .

In *Hill*, 530 U.S. at 717, this Court quoted the above passage in its entirety and used it to describe the privacy portion of the right to be let alone. It also made it clear that the right applies with varying force in the labor context, in one's home, near one's home, near a medical facility, in Central Park, or in "confrontational" situations. *Id.* at 716. Surely the right to be let alone is not a completely different animal in the school setting. In fact, the most natural reading of the Ninth Circuit's opinion is that it considered Chase's expression to constitute a confrontational situation.

Thus, we can clearly ascertain whether the right to be let alone was implicated by Chase's speech. It was not. There is nothing in the record to indicate that Chase persisted, importuned, followed, dogged, or intimidated. By refusing to face foursquarely what the right to be let alone covers, the Ninth Circuit was able to claim that the right was violated. Nothing could be farther from the truth. This Court should grant *certiorari* to clarify that the right to be let alone means in *Tinker* exactly what it means in every other context—nothing more and nothing less. Schools may not invoke the right to be left alone to disguise a heckler's veto. And courts may not bless such disguises.

B. The Ninth Circuit's "Right to be Secure" Rationale is a Mask for Poway's Heckler's Veto Because that Right Protects Students' Safety and no Students' Safety was Threatened Here.

Finally, this Court should grant *certiorari* to clarify that invoking the right to be secure does not give schools or courts *carte blanche* to ride roughshod over *Tinker*. Again, the right to be secure has a discernable meaning. The right to be secure is the right to be safe. Indeed, this is the teaching of the opinions that the Ninth Circuit cited—and twisted. The

Ninth Circuit appeared[7] to rely upon *West v. Derby Unified School District*, 206 F.3d 1358 (10th Cir. 2000); *Sypniewski v. Warren Hills Regional Board of Education*, 307 F. 3d 243, 264 (3rd Cir. 2002); and *Muller by Muller v. Jefferson Lighthouse School*, 98 F.3d 1530, 1540 (7th Cir. 1996) for its view of the right to be secure.

However, these cases do not support—indeed, they contradict—the Ninth Circuit's view that Chase's message violates the right of other students to be secure. The Ninth Circuit cites these case for the proposition that the right to be secure includes things such as the right of students to be free from (read "the right to squelch") speech that is "detrimental . . . to their psychological health and well-being." *Harper*, 445 F.3d at 1179. However, each case is clear that it is concerned about one thing: the physical safety of students.

So for example, in *West v. Derby Unified School District*, 206 F.3d 1358 (10th Cir. 2000), the court noted that both the Ku Klux Klan and the Aryan Nation were recruiting public school students, that a *series* of racial incidents had occurred, that at least one fight had occurred, and that graffiti had included not only "KKK" (obviously standing for Ku Klux Klan) but also "KKKK" (standing for Ku Klux Klan Killer) and "Die Nigger." It is beyond all cavil that the right to be secure there was the right to be safe.

The same is true of *Sypniewski v. Warren Hills Regional Board of Education*, 307 F. 3d 243, 264 (3rd Cir. 2002). We note first that only a portion of the school policy at issue there was upheld while the remainder was struck. Furthermore, the important point here is that students' safety was at issue, contrary to the Ninth Circuit's use of the case.

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[7] *Amicus* says "appeared" because the Ninth Circuit also relied upon numerous periodicals (which are suspect, as per the dissent's critique 445 F.3d at 1199 (Kozinski, J., dissenting)); because it also cited *Saxe v. State College Area School District*, 240 F.3d 200, 217 (3rd Cir. 2001), but primarily for propositions at odds with the Ninth Circuit's position; and because it is difficult to ascertain the difference between what the court was writing about the right to be let alone and the right to be secure.

Specifically, the court noted that the school district initially refused to adopt a policy restricting speech or expression even in the face of significant racial tension. *Id.* at 248. However, the district did eventually adopt such a policy. However, after *months* of racial tension and *numerous* incidents, the district finally put policies in place only when "[i]t was the consensus of the Board of Education and [the Superintendent] that there had been significant disruption in the school and that the minority population was at significant risk from, not only verbal and intimidating harassment but also, increasingly, *the risk of physical violence*." *Id.* at 249 (emphasis added). Yet to the extent that the court even addressed the right of students to be secure (it quoted the phrase from *Tinker* several times, but never engaged in a separate analysis), it did not permit the district to "secure" students from speech that would harm their self esteem or "strike[ ] at a core identifying characteristic." *Harper*, 455 F.3d at 1182, n.27. To the contrary, the court enjoined enforcement of a provision of the Harassment Policy that banned derogatory terms or racial slurs if they caused ill will. *Sypniewski*, 307 F.3d at 262.

In fact, the use of *Sypniewski* by the Ninth Circuit is somewhat of a mystery. The following passage shows both that *Sypniewski* did not clearly distinguish between *Tinker's* "substantial disruption" prong and its "rights of others" prong and that the "right to be secure" must—by logical implication—mean the right to physical safety, not the right to be free from encountering hurtful speech:

> the language of the Warren Hills policy appears to cover speech that is not subject to lawful regulation under *Tinker*. Understood broadly, it seems likely there will be a good deal of speech that creates "ill will" that does not substantially interfere with the rights of other students or with the operation of the school as an educational institution. There may also be some harassment "by name calling" that does not genuinely threaten disruption.

Sypniewski, 307 F.3d at 262.

Finally, the Ninth Circuit relied upon *Muller by Muller v. Jefferson Lighthouse School*, 98 F.3d 1530 (7th Cir. 1996). This is even more of a mystery. First, *Muller* never even discussed the right to be secure. Rather it made a few passing references to the "rights of others." *Id.* at 1536, 1542. However, the *Muller* court's main use of *Tinker* was to question its applicability to the elementary school context. *Id.* at 1535-39. Ultimately, the court assumed without deciding that *Tinker* is applicable in elementary schools. *Id.* at 1539. However, *Muller's* comments, quoted by the Ninth Circuit, about restricting speech "'that could crush a child's sense of self worth,'" *Harper*, 455 F.3d at 1179 (quoting *Muller*, 98 F.3d at 1540) are explicitly limited to elementary schools, *Muller*, 98 F.3d at 1539, and to *their* "delicate 'custodial and tutelary' environment," *id.* The *Muller* court did *not* link the propriety of such restrictions to the right of other students to be secure. Furthermore, the *Muller* court—again being uncomfortable with applying *Tinker* in the elementary school context—grounded the legitimacy of these restrictions on *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), not on *Tinker*.

Thus, none of the cases that the Ninth Circuit relied upon supports its position. Therefore, the Ninth Circuit is left with nothing but its own *ipse dixit* to support its assertion that "[b]eing secure involves not only freedom from physical assaults but from psychological attacks . . . ." *Harper*, 445 F.3d at 1178. Once again, the Ninth Circuit's view blesses Poway's heckler's veto. Schools can and must protect students' right to be secure, *i.e.*, their right to be safe. However, they cannot invoke that duty to avoid another duty—their protection of their students First Amendment rights. Two of the very cases the Ninth Circuit cited, *West* and *Sypniewski*, show schools and courts wrestling with the hard questions in contexts much more volatile that that facing Poway. Poway, in contrast, appears to have engaged in a

course of action that the *Hedges* court would call "the easy way out," 9 F.3d at 1299: "it has throw[n] up its hands, declaring that . . . . the best defense . . . is censorship." *Id.* And the Ninth Circuit—instead of following the path of the *West* and *Sypniewski* courts and thereby restricting expression in the name of the right of students to be secure only where students' safety is threatened—has blessed Poway's heckler's veto.

This Court should grant *certiorari* to clarify that the Ninth Circuit's view of the right to be secure is erroneous and that of the other Circuits is correct.

CONCLUSION

This Court should grant *certiorari* in this case for one simple reason: The decisions of the courts below ignore the lessons of the Civil Rights movement. A heckler's veto cannot be used to silence minorities. But neither can it be used to silence majorities. The goal is *equality*. *Brown v. Louisiana*, 383 U.S. 131, 143 (1966).

This Court in *Tinker* has already made all the school-appropriate adjustment to the heckler's veto doctrine that the First Amendment will allow. When real fear of disruption exists, when students are dogging and following each other, or when students are threatening each other's safety, schools can and must act. However, when schools take "the easy way out," they stand *Tinker* on its head. Therefore, this Court should grant *certiorari* to once again reiterate what should have long ago become axiomatic: "students . . . [do not] shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker*, 393 U.S. at 506.

Respectfully submitted,

This 28th day of December, 2006
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